

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONER AND JOINT APPENDIX.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED AUG 3 1964

No. 18,667

Nathan J. Paulson
CLERK

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and UNITED
STATES OF AMERICA.

Respondents

ON PETITION FOR REVIEW OF FEDERAL
MARITIME COMMISSION ORDER.

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QUESTIONS PRESENTED.

1. Whether the Federal Maritime Commission under Section 21 of the Shipping Act, 1916, pursuant to which the Commission purports to act, has the authority to audit the books and records of Petitioner, Alcoa Steamship Company, Inc., as is being sought in the Commission's order?

2. Whether the Commission has the authority to conduct an audit under its own rules and the Administrative Procedure Act?

3. Whether the Commission's order is so broad that it goes beyond what is reasonably relevant to the Commission's statutory authority under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and constitutes an undue burden on the Petitioner?

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JURISDICTIONAL STATEMENT.

This petition is to review a final order of the Federal Maritime Commission (the "Commission") entered on April 7, 1964 and served on Alcoa Steamship Company, Inc. by mail on April 8, 1964, purportedly issued pursuant to Section 21 of the Shipping Act of September 7, 1916, c. 451, 39 Stat. 728, as amended, 46 U. S. C. A. 801-842 (the "Act"). Review is sought and the jurisdiction of this Court is based upon the provisions of the Act of December 29, 1960, c. 1189, 64 Stat. 1129-1132, as amended, 5 U. S. C. A. 1031-1042. Venue in this Court is based upon the Act of December 29, 1960, c. 1189, Section No. 3, 64 Stat. 1130, as amended, 5 U. S. C. A. 1033.

Pleadings showing the existence of jurisdiction are found in the petition to review filed with this Court.

STATEMENT OF FACTS.

Petitioner, Alcoa Steamship Company, Inc., is an unsubsidized operator of American flag vessels and has been engaged in shipping for approximately the past forty years. Beside operating American flag vessels owned by it, Petitioner also operates under charters other vessels. Petitioner's operations are worldwide. Not only do Petitioner's vessels trade as common carriers in the domestic offshore trade of the United States, from United States ports to ports in Puerto Rico and the Virgin Islands, but its vessels also trade in the foreign commerce of the United States and between ports of foreign nations. Petitioner's vessels engage in private carriage as well as common carriage.

The Commission, pursuant to its General Order No. 5, (A-2*) issued under the authority contained in Section 21 of the Shipping Act, 1916, requires common carriers by water engaged in the domestic offshore trades to file certain financial reports. The application of General Order No. 5 is limited to persons engaged in the domestic offshore trades of the United States. Pursuant to this order, Petitioner

* References "(A-)" are to Schedule A attached.

filed a financial report, Form FMC-64, covering the calendar year 1962. Such report comprises 96 pages and was filed with the Commission under letter dated June 13, 1963 and signed under oath by Oscar A. Swenson, Secretary of Petitioner (J. A. 7). Thereafter by letter dated December 17, 1963, the Commission advised Petitioner that the Bureau of Financial Analysis would conduct a field audit of the accounts, books and records of Petitioner. By letter dated December 17, 1963, Petitioner was advised:

"In compliance with your request, you are advised that the area of the audit is to be *corporate wide*, i.e., it will not be limited to a single activity or to a selected group of activities * * *

"The purpose of the audit is to verify the accuracy of the financial report which you submitted on Form FMC-64 for the calendar year 1962, * * *" (Emphasis added) (J. A. 8).

By letter of February 4, 1964, Petitioner declined such audit in view of the fact that Docket No. 1152 had been instituted by the Commission (J. A. 10).

Docket No. 1152 was instituted by the Commission by notice of proposed rulemaking which appeared in the Federal Register on October 23, 1963 (27 F. R. 11,318) (A-5) wherein as to common carriers in the domestic offshore trade, the Commission proposed the issuance of "rules which will require vessel operating common carriers by water in the domestic offshore trades to file with the Commission semi-annual statements setting forth rate bases and income accounts for each regulated trade in which operations are performed." In Section 5 of such proposed rules, audits of carriers' books and records were to be specifically provided for as follows:

"Sec. 5. Access to working papers.

All working papers (irrespective of by whom prepared) in support of all exhibits and schedules submitted, as well as the books and records of the carrier, shall be made available upon request for examination by *auditors* representing the Federal

Maritime Commission, and said *auditors* shall be permitted to make copies of such records to the extent they deem necessary" (Emphasis added).

In accordance with such notice of proposed rulemaking, Petitioner submitted comments and arguments concerning such proposed rules. Among other things, Petitioner contested the Commission's authority to audit their books and records in the absence of a provision in the Shipping Act, 1916, as amended (46 U. S. C. 801 et seq.) or the Intercoastal Shipping Act of 1933 (46 U. S. C. 843 et seq.) authorizing such audits. The Commission did not grant an evidentiary hearing or the opportunity of oral argument as sought by Petitioner, in Docket No. 1152. The rules as proposed under Docket No. 1152 would have prescribed the manner in which carriers, engaged in the domestic off-shore trade, would be required to maintain their books and records and Petitioner contested such provisions as not being authorized by statute. Such requirement was not incorporated in such rules as subsequently promulgated under General Order No. 11 (A-20).

Notwithstanding the pendency of Docket No. 1152, on April 7, 1964 the Commission issued the order herein under review requiring Petitioner to produce for the purpose of being audited, virtually all its financial records for the year 1962, without any limitation whatever. Said order required Petitioner to submit itself to such audit at the Commission's offices in Washington, D. C. or such other place as may be satisfactory to the Director of the Bureau of Financial Analysis of the Commission on or before the close of business, April 27, 1964 (J. A. 13). By subsequent orders the time for such audit was extended to June 4, 1964 (J. A. 14, 20).

STATUTES INVOLVED.

The relevant parts of all statutes, orders and rules involved are set forth in Schedule A hereto.

STATEMENT OF POINTS.

I. The Commission does not have statutory authority to audit the books and records of Petitioner under Section 21 of the Shipping Act, 1916.

II. The Commission did not at the time of issuance of its order to Petitioner nor at the present time have the authority to conduct an audit under its own rules.

III. The Commission's order is so broad it constitutes an undue burden on Petitioner.

SUMMARY OF ARGUMENT.

The Federal Maritime Commission in issuing the order of April 7, 1964, purportedly pursuant to Section 21 of the Shipping Act, 1916, acted beyond any statutory power vested in it. Section 21 makes no provision for audits. The order seeks to extend the proposed audit to trades engaged in by Petitioner which are beyond the jurisdiction of the Commission.

Section 21 is based on Section 20 of the Interstate Commerce Act as it existed prior to being amended in 1920 and again in 1940. Under such amendments, the Interstate Commerce Commission was granted authority to prescribe not only the manner in which regulated companies would maintain their books and accounts but also authorized the Interstate Commerce Commission to copy such books and accounts. No similar amendment has been made to the Shipping Act conferring comparable authority on the Federal Maritime Commission.

The Congress has not only authorized the Interstate Commerce Commission to make audits by express language with respect to railroads, motor carriers and water carriers but has also granted such power to the Civil Aeronautics Board and the Federal Power Commission. Audit power has also been vested by express statutory authority in the

Maritime Administration with respect to subsidized common carriers. No such express statutory authority has been granted to the Federal Maritime Commission under Section 21.

Although Section 21 has been in existence for the past forty-eight years, the Commission has apparently never interpreted it as granting a power to audit.

The Commission's order is further defective in that it fails to state a valid purpose. At most the order cites the fact that the Commission has responsibilities with respect to rates charged in the domestic and foreign commerce and further states that the audit is sought to evaluate and verify the FMC Form No. 64 filed by Petitioner for the year 1962 alleging that in the absence thereof, such filing would be of uncertain value. Such alleged purposes are so vague that they do not permit a determination as to the relevancy of the documents sought to be audited and are therefore invalid.

The order of April 7, 1964, was issued at a time when Docket No. 1152 was still pending before the Commission. Such rulemaking proceeding proposed requiring carriers engaged in the domestic offshore trade to submit to audits. Having instituted such proceeding, the Commission not only admitted lack of authority under its own rules to require audits but was estopped from requiring audits until final determination of such docket by the Commission.

Assuming, without admitting, authority in the Commission to require audits, the proposed audit is an undue burden upon Petitioner in violation of the Fourth Amendment of the Constitution in that it is unlimited and would require an audit of Petitioner's records concerning trades other than the domestic offshore trade which other trades compromise approximately 75% of Petitioner's business. Further, Petitioner has already incurred substantial expense in connection with preparing and filing Form FMC-64 covering 1962. The order in question would require Petitioner to submit to the further unnecessary expense of

a detailed audit with respect to said Form FMC-64 for the year 1962. The proposed audit would require divulging confidential information as to Petitioner's participation in private carriage and between foreign ports, outside the jurisdiction of the Commission, in violation of Petitioner's obligations to its shippers and to their competitive detriment and that of Petitioner.

ARGUMENT.

I.

THE COMMISSION DOES NOT HAVE AUTHORITY TO AUDIT THE BOOKS AND RECORDS OF PETITIONER UNDER SECTION 21 OF THE SHIPPING ACT, 1916.

The Commission's order of April 7, 1964 expressly states:

"* * * the Commission's staff must conduct *audits* of the books and records of the reporting carriers and other persons subject to the Act. Such *audits* are absolutely necessary to discharge the Commission's responsibilities * * * A request to *audit* certain books and records was made of Alcoa Steamship Company, Inc. and this request was refused" (Emphasis added) (J. A. 12-13).

There can be no doubt but that the order seeks an *audit* of the books and records of Petitioner for 1962.

Section 21 of the Shipping Act, 1916, under which the order of April 7, 1964 purports to have been issued, makes absolutely no provision authorizing the Commission to audit books and records of persons subject to said Act or to the Intercoastal Shipping Act, 1933. The purpose of the order is not to require the filing of a further financial report or data by Petitioner. Indeed, the order admits that "pursuant to this General Order [General Order No. 5], Alcoa Steamship Company filed FMC-64 (a report required by this order) for the calendar year 1962" (J. A. 12).

The purpose of the order of April 7, 1964 is to establish a continuing right in the Commission to audit all of the books and records of Petitioner and presumably the books and records of any common carrier engaged in the foreign or domestic commerce of the United States* whenever it desires to do so. The Commission admits that it is endeavoring to establish a right to make "regular periodic audits" (J. A. 9). Thus, the order seeks to compel the audit of practically all of Petitioner's books and records for the calendar year 1962 whether relating to the domestic offshore trade (the basis for filing financial reports under General Order No. 5) or to its other common carrier or private carriage operations.

The Commission has no authority whatever over private carriage. Its statutory authority was granted with respect to common carriage both domestic and foreign. Such authority is greater with respect to the domestic commerce.

Congress has made it clear in statutes dealing with other transportation industries that when the regulatory agency is intended to be empowered to require audits, as the Commission here seeks by the order under review, such power shall be expressly set forth in the governing statute.

The power to conduct audits has been granted by the Congress in the past to many administrative agencies. Such power generally has been granted in connection with authority given to such agencies to designate the form in which a regulated company shall be required to keep its financial records. In the present case the Congress has failed to grant any power to the Commission to require audits of books and records of carriers in either the domestic or foreign trade and the Congress has withheld from the Commission the power to prescribe how such carriers shall keep their accounts.

* Although the order of April 7, 1964 makes reference to General Order No. 5 which concerns only the domestic offshore trade, the first sentence of such order of April 7, 1964 expressly cites the Commission's responsibilities not only in the domestic offshore commerce but " * * * relative to rates charged in the *foreign commerce* of the United States * * * " (Emphasis added).

The Congress has granted the Interstate Commerce Commission in the Interstate Commerce Act, 49 U. S. C. 20, the right to require of railroads periodic reports based on a required uniform system of accounts as well as the right of access to the carrier's accounts, books, records, etc. Such Act at 49 U. S. C. 20(5) empowers the Interstate Commerce Commission " * * * to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers * * * ". The section further provides that:

"Such carriers, lessors and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph * * * to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials."

The Interstate Commerce Commission has also been granted power to prescribe a uniform system of accounts in 49 U. S. C. Section 20(3).

Section 21 of the Shipping Act, enacted in 1916, was modeled upon Section 20 of the Interstate Commerce Act as it then existed. At that time the Interstate Commerce Act contained no provision granting the Interstate Commerce Commission the right to prescribe the manner in which carriers would maintain their accounts, books and records nor did the Interstate Commerce Act authorize the Interstate Commerce Commission to copy such accounts, books and records. Thereafter by amendments of February 28, 1920 and September 18, 1940, Sections 20 (3) and (5) granted the Interstate Commerce Commission such authority. No comparable amendment has been made with respect to the Shipping Act, 1916, granting the Commission similar authority.

In similar language, under 49 U. S. C. Section 320(d), the Interstate Commerce Commission has been granted authority to audit as well as prescribe a uniform system of accounts for motor carriers. Also, as to water carriers,

the Interstate Commerce Commission, under 49 U. S. C. Section 913(f), has been given the authority to audit, in similar terms to the powers given the Interstate Commerce Commission over rail carriers and motor carriers. In all three of these statutes granting authority to the Interstate Commerce Commission over railroads, motor carriers, and water carriers, there are provisions setting forth the Commission's authority "to require annual, periodical or special reports from carriers" but separate provisions granting authority to audit.

The Congress has followed this manner of granting authority to audit to administrative bodies other than the Interstate Commerce Commission. The jurisdiction of the Civil Aeronautics Board to require " * * * annual, monthly, periodical and special reports from any air carrier" is expressly authorized in 49 U. S. C. 1377(a). The Civil Aeronautics Board is expressly empowered to audit in 49 U. S. C. Section 1377(e). Similarly, the Federal Power Commission has expressly been granted authority to audit accounts, records and memoranda of public utilities and licensees under the provisions of 16 U. S. C. 825 (b) as well as express statutory authority to audit the books and records of natural gas companies in 15 U. S. C. 717g(b).

Even the predecessor of the Federal Maritime Commission was expressly granted authority to audit records of subsidized operators which authority is now exercised by the Maritime Administration of the Department of Commerce. The Merchant Marine Act, 1936, 46 U. S. C. A. 1211(3) grants authority to examine and audit the books and records of ocean common carriers receiving construction and operating differential subsidy in the following express language:

" * * * (3) that the Secretary (now Maritime Administration) shall be authorized to examine and *audit* the books, records, and accounts of all persons referred to in this section whenever it may deem it necessary or desirable * * * " (Emphasis added).

Petitioner receives neither such construction nor operating differential subsidies and does not operate under any franchise or license granted by the Federal Maritime Commission.

The Courts have emphatically and repeatedly stricken down orders of administrative agencies issued beyond the power conferred by the statute itself as constituting unlawful administrative regulation. *Federal Communications Commission v. American Broadcasting Company*, 347 U. S. 284, 296-7 (1954). It is well settled that the Commission, as an administrative agency, can exercise only those powers conferred on it by Congress. *Civil Aeronautics Board v. Delta Airlines Inc.*, 367 U. S. 316, 322 (1961).

This Court, in an analagous situation, in *Alaska Airlines v. Civil Aeronautics Board* (App. D. C.—1958) 257 F. 2d 229, 230, cert. den. 358 U. S. 881, denied that the Civil Aeronautics Board had the right to issue a uniform system of accounts and reports to be made by air carriers which regulated depreciation charges. This Court pointed out that Congress had specifically and expressly authorized one regulatory agency after another to control depreciation practices but had not so empowered the Civil Aeronautics Board. This Court stated at page 230:

“The question is what intention should now be attributed to Congress. Congress has *expressly* authorized one regulatory agency after another to control depreciation practices. It has done so in the Federal Power Act, (footnote omitted) the Natural Gas Act, (footnote omitted) and the Interstate Commerce Act, Part II, dealing with motor carriers. The 1940 amendment of the Motor Carrier Act provides: ‘The Commission may prescribe for motor carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged with respect to each of such classes of property * * *’ (footnote omitted). In the Interstate Commerce Act, Parts I and III, dealing with railroads and water carriers, (foot-

note omitted) and the Federal Communications Act, (footnote omitted) Congress expressly *required* the agency to prescribe depreciation practices. We conclude that when Congress wishes to confer such authority, it says so."

Thus, it is clear that when the Congress intends to grant to an administrative agency the authority to audit books and records of those it regulates, Congress has uniformly granted such power by express statutory provision. No such investiture of statutory power in the Federal Maritime Commission exists. By its order of April 7, 1964, the Commission has exceeded its authority in endeavoring to require an audit of Petitioner's books and records. There is no indication that since 1916, when Section 21 of the Shipping Act was enacted, the Commission has endeavored to obtain audits of common carriers subject thereto. Apparently, until issuance of its order on April 7, 1964, the Commission itself interpreted Section 21 as not authorizing audits.

The order of April 7, 1964 states that its purpose is "to evaluate and verify" the Form FMC-64 submitted by Petitioner for the calendar year 1962 and further states that without such audit said form is of "uncertain value to the Commission".

Form FMC-64 was submitted on the verification of the Secretary of Petitioner. The order of April 7, 1964 fails to state any reason or cause for doubt as to the value of such verified Form FMC-64. This Court in *Montship Lines, Limited v. Federal Maritime Board* (App. D. C.—1961) 295 F. 2d 147, stated at page 155:

"* * * and just as the *reasons* underlying agency action must appear from the agency's order, so too we think that the statement of *purpose* must be apparent from the order itself and cannot be supplied by contentions in the briefs.

"Since the reasonableness of the order under review is dependent upon the relevancy of the information demanded, and that cannot be determined *in the*

absence of a statement of purpose, the order is fatally defective" (Emphasis added).

The only *reason* or *purpose* set forth in the order of April 7, 1964, is that "to *evaluate* and *verify* the reports * * * the Commission's staff must conduct audits * * * and if they were not undertaken, the reports * * * would not be subject to verification and therefore of *uncertain value*" (Emphasis added). A broad and vague statement giving no reason for the alleged doubts as to the value of the verified Form FMC-64 filed by Petitioner does not constitute a valid *reason* or *purpose* for the proposed audit.

The order of April 7, 1964 recites the general statutory obligation of the Commission with respect to determination as to whether rates are just and reasonable. The proposed audit is directed to the calendar year 1962. It does not seek information with respect to presently existing rates. The order fails to make any indication that Petitioner's rates in 1962 were in any respect unjust or unreasonable.

It is submitted that the proposed audit in connection with Form FMC-64 filed by Petitioner for the year 1962, will not in any way aid the Commission in carrying out its responsibilities relative to rates charged in the domestic and foreign commerce of the United States. Form FMC-64 was originally drafted in connection with information sought as to subsidy matters under the Merchant Marine Act of 1936. Rate regulating responsibilities of the Commission under the Shipping Act of 1916 were not considered in the formulating of Form FMC-64. Thus, an audit of such form, having little or no regulatory purpose would be of no assistance to the Commission in carrying out its responsibilities under the Shipping Act of 1916.

It is submitted that the vague statements of purported purpose in the order of April 7, 1964 are not valid purposes and fail to provide any standard for determining the relevancy of the documents sought to be audited. Said order should be vacated. *Hellenic Lines, Limited v. Federal Maritime Board* (App. D. C.—1961) 295 F. 2d 138, 140.

II.

THE COMMISSION DID NOT AT THE TIME OF ISSUANCE OF ITS ORDER TO PETITIONER NOR AT THE PRESENT TIME DOES IT HAVE THE AUTHORITY TO CONDUCT AN AUDIT UNDER ITS OWN RULES.

By notice of proposed rulemaking on February 23, 1963 (27 F. R. 11,318), prior to issuance of the order herein under review, the Commission proposed issuance of rules which would require vessel operating common carriers by water in the domestic offshore trades to file statements setting forth rate bases and income accounts. Section 5 of such proposed rules expressly provided that the Commission would have the right to *audit* such carrier's books and records. See pp. 2-3, *supra*.

The Commission's General Order No. 11 of June 2, 1964 was published in the Federal Register on June 17, 1964 (29 F. R. 7721), (A-20) based on the proceedings in Docket No. 1152 requiring in part that carriers in the domestic offshore trades, submit statements of rate base and income account to the Commission commencing with calendar year 1963. General Order No. 11 makes express provision for audits as follows:

"§512.5. Access to working papers.

All working papers (irrespective of by whom prepared) in support of all exhibits and schedules submitted, as well as the books and *records* of the carrier, shall be made available upon request for examination by *auditors* representing the Federal Maritime Commission, and said *auditors* shall be permitted to make copies of such records to the extent they deem necessary." (Emphasis added).

By the institution of Docket No. 1152, the Commission raised the question as to whether it has the power to audit books and records. It made such question the subject of rulemaking proceeding Docket 1152. By issuing

General Order No. 11, the Commission undertook to provide itself with such power. Even in so providing in General Order No. 11, the Commission does not endeavor to extend such power to the calendar year 1962.

The Administrative Procedure Act provides in 5 U. S. C. §1003 as follows:

“Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose * * *”.

When in October, 1963, the Commission elected to determine the question of its power to conduct audits by the rulemaking procedure, the Administrative Procedure Act precluded the Commission from making an independent determination of such question. Notwithstanding such preclusion, the Commission issued its order of April 7, 1964. By the institution of Docket No. 1152 in October, 1963, and at the time of issuing its order in April, 1964, when Docket No. 1152 was still pending, the Commission admittedly did not have the power under its own rules to require an audit. It was not until the issuance of General Order No. 11 in June, 1964 that the Commission promulgated a rule purportedly authorizing audits. Indeed, even upon the issuance of General Order No. 11, the Commission did not endeavor to so empower itself with respect to periods of time prior to 1963 nor is the audit there provided for as broad as the Commission has ordered under this Section 21 order.

The Commission is bound by its own rules. *Accardi v. Shaughnessy*, 347 U. S. 260 (1954); *Service v. Dulles*, 354 U. S. 363 (1957). Its rules admittedly did not provide for audits as late as October, 1963 when Docket No. 1152 was instituted. On April 7, 1964, the Commission was not at

liberty to interpret its rules to include such power, since, by the institution of the contemporaneous rulemaking proceeding in which it proposed promulgating just such a rule, the Commission admitted the absence of any such power.

Even by the promulgation of General Order No. 11 in June, 1964, the Commission still failed to provide by rule a right in itself to audit documents with respect to Form FMC-64 reports submitted for 1962 and prior years.

III.

THE COMMISSION'S ORDER IS SO BROAD IT CONSTITUTES AN UNDUE BURDEN ON PETITIONER.

The Commission's order of April 7, 1964 contains no restriction as to the extent of the documents required to be produced. The proposed audit is to be "corporate wide" (J. A.). General Order No. 5, requiring the filing of Form FMC-64 limits itself to the domestic offshore trade. If we assume, which we deny, that a power to require audits is possessed by the Commission, such power would not be without any limitations whatever as to the extent thereof.

Petitioner's participation in the domestic offshore trade comprises approximately 25% of its entire worldwide operations. The audit sought by the order of April 7, 1964 would encompass all of Petitioner's operations not only in the domestic offshore trade but also its foreign operations and not only its operations as a common carrier but also as a private carrier. There is no justification for granting the Commission a detailed audit of Petitioner's books and records in connection with its private carriage as well as non-domestic offshore operations, constituting about 75% of its total business. Assuming the Commission's right to audit, to submit the remaining 75% of Petitioner's worldwide operations to such an audit is unduly burdensome. The order of April 7, 1964 gives no valid reason for submitting Petitioner to such burden and violated the Fourth Amendment of the Constitution.

The information requested by the Commission under General Order No. 5 has been produced by Petitioner on the form required by the Commission. In no way does the order of April 7, 1964 indicate that further original information is required. On the contrary, such order specifically states that its sole purpose is to "evaluate and verify" information which Petitioner had theretofore produced. Under the circumstances any unrestricted requirement for audit without limitation is not relevant to any statutory responsibility of the Commission, is unreasonable and is an undue burden on Petitioner. *Montship Lines, Limited v. Federal Maritime Board* (App. D. C.—1961) 295 F. 2d 147.

In *United States v. Morton Salt Co.*, 338 U. S. 632 (1950), the Supreme Court stated at page 652:

"Of course a governmental investigation into corporate matters may be of such a *sweeping nature* and so unrelated to the matter properly under inquiry as to exceed the investigatory power * * *"
(Emphasis added).

Further, in complying with the Commission's requirement that Form FMC-64 be filed, there is little question but that substantial expense has already been incurred by Petitioner in filing "this voluminous detailed report" (J. A. 6) of 96 pages. To require Petitioner now to submit itself to a lengthy unlimited "corporate wide" audit merely for the vague purpose of evaluating and verifying Form FMC-64, a form not suited to Federal Maritime Commission's regulation responsibilities, would indeed constitute an unreasonable search and seizure and would subject Petitioner to a financial burden " * * * out of all reasonable proportion to any purpose that the proposed investigation might have." *Kerr Steamship Company v. United States* (2 Cir.—1960), 284 F. 2d 61, 64.

This order constitutes an endeavor by the Commission to institute a right to "regular periodic audits" (J. A. 9). Costs in connection therewith will no doubt be substantial. Such costs will, of necessity, have to be reflected in the rates charged by Petitioner to its shippers.

The order of the Commission in requiring an audit of Petitioner's operations in non-regulated trades requires production of highly confidential information which if divulged to competitors would be extremely detrimental not only to Petitioner but also to those whose cargo Petitioner transports.

Petitioner participates in the private carriage of raw materials in bulk, for example, bauxite and alumina. Such carriages are worldwide, not only from ports of the United States to Japan and Australia and to ports of the United States from Surinam, the Dominican Republic and Jamaica but also between foreign ports, as from Surinam to Norway. Not only is Petitioner faced with strong competition in such trades but its parent company, the Aluminum Company of America, must compete with respect to the sale of its products. Petitioner also carries other bulk commodities such as sugar, fertilizer, etc. in private carriage for other customers. Petitioner has an obligation of confidentiality to its customers concerning the cost of transporting such produce. Petitioner has no right to divulge such information. Should such information not be kept secret, the economic effects on Petitioner and its customers could be dire.

CONCLUSION.

For the foregoing reasons, Petitioner prays that this Court vacate the Commission's order issued April 7, 1964,

and grant such other and further relief as the Court may deem proper.

Respectfully submitted,

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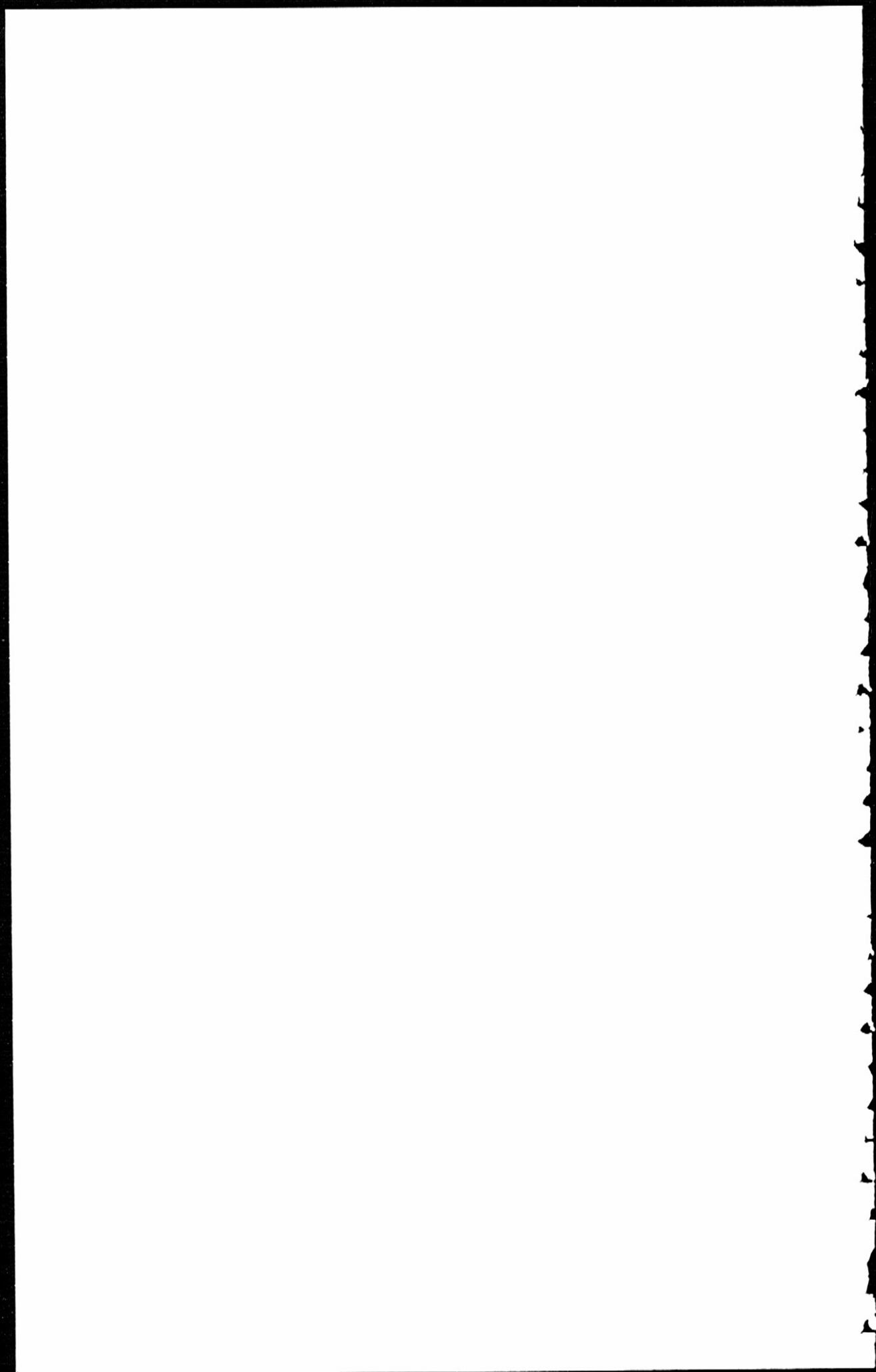
Dated: August 3, 1964.

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SECTION 21 OF THE SHIPPING ACT, 1916
(46 U. S. C. 820)

SCHEDULE A

“§820. REPORTS BY CARRIERS REQUIRED

“The Federal Maritime Board and the Secretary of Commerce may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

“Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge, or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than \$1,000, or imprisonment for not more than one year, or to both such fine and imprisonment. Sept. 7, 1916, c. 451, §21, 39 Stat. 736; Ex. Ord. No. 6166, §12, June 10, 1933; June 29, 1936, c. 858, §§204, 904, 49 Stat. 1987, 2016; 1950 Reorg. Plan No. 21, §§104(5), 105(4), 305, 306, eff. May 24, 1950, 15 F. R. 3178, 64 Stat. 1274, 1275 1277.”

GENERAL ORDER NO. 5.

DOMESTIC OFFSHORE TRADES—REPORTS

[¶322:151-322:157]

Reports by Common Carriers by Water in the Domestic Offshore Trades.

GO 5 (FMC) (46 CFR §§511.1-511.4)

NOTE: GO 5 was issued January 15, 1962, effective January 24, 1962 (27 FR 695). Sections 511.2, 511.3 and 511.4 amended by order adopted July 10, 1962, effective July 21, 1962 (27 FR 6939), to dispense with filing of semi-annual financial reports for the year 1962. Sections 511.5, 511.6 and 511.7 added by Amendment 2 adopted March 26, 1963, effective March 30, 1963 (28 FR 3124). Sections 511.2, 511.3 and 511.4 amended by Amendment 4 adopted May 21, 1963, effective May 29, 1963 (28 FR 5300) to dispense with filing of semi-annual reports beginning with 1963. Section 511.6 amended by Amendment 3 adopted July 30, 1963, effective August 7, 1963 (28 FR 8041) to provide time limit for filing applications for release from compliance with reporting requirements. Section 511.4(b) added by Amendment 5 adopted October 3, 1963, effective October 12, 1963 (28 FR 10973).

[¶322:151] §511.1 PURPOSE. The data to be furnished are for the Federal Maritime Commission's use in discharging the statutory rate regulatory responsibilities with which it has been charged by applicable provisions of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended.

[¶322:152] §511.2 FILING BY OPERATORS OF SELF-PROPELLED VESSELS. All persons engaged in the operation of self-propelled vessels in the common carriage of persons or property in the domestic offshore trades (except persons engaged in

intrastate operations in Alaska and Hawaii), and required by the Intercoastal Shipping Act, 1933, as amended, to file tariffs with the Federal Maritime Commission, shall execute and file with the Secretary, Federal Maritime Commission, the joint report presently referred to as the Maritime Administration Form MA-172 and the Interstate Commerce Commission Form M for the years 1961 and 1962 and then annually for each year thereafter.

[§322:153] §511.3 FILING BY OPERATORS OF VESSELS OTHER THAN SELF-PROPELLED. All persons engaged in the operation of vessels, other than self-propelled, in the common carriage of persons or property in the domestic offshore trades (except persons engaged in intrastate operations in Alaska and Hawaii), and required by the Intercoastal Shipping Act, 1933, as amended, to file tariffs with the Federal Maritime Commission, shall execute and file with the Secretary, Federal Maritime Commission, the report presently referred to as the Interstate Commerce Commission Form K-A for the years 1961 and 1962 and then annually for each year thereafter.

[§322:154] §511.4 TIME FOR FILING.—(a) For any fiscal year ending after June 30, 1961, and prior to the publication of this part, the persons concerned shall file the first annual statement covering that year within 120 days of the publication of this part. For any fiscal year ending after January 24, 1962 but prior to July 1, 1962, the person concerned shall file the first annual statement covering that year within 120 days after the end of that fiscal year. After the filing of the second annual statement, each person concerned is required to file an annual statement within 120 days of the close of each fiscal year.

(b) Upon application, the Commission may grant reasonable extensions of the time limit prescribed by this section for filing the statements and data required by this part, provided that (1) the application therefor is received fifteen (15) days before the statements and data are due; (2) the application sets forth good and sufficient reasons to justify

the extension requested; (3) the application states a specific date on, or before, which the statements or data will be filed; and, (4) the application is not to be construed as constituting relief from possible penalties for tardy filing, unless it is granted.

[§322:155] §511.5 FORM NUMBER DESIGNATIONS.—The joint report referred to in §511.2 as Maritime Administration Form MA-172 and Interstate Commerce Commission Form M and the report referred to in §511.3 as Interstate Commerce Commission Form K-A shall henceforth bear the additional notations, "Federal Maritime Commission Form FMC-64" and "Federal Maritime Commission Form FMC-63" respectively.

[§322:156] §511.6 ACCEPTANCE OF ALTERNATE DATA.—The Commission, upon application filed not less than sixty days before reports under this part are due, and upon a showing of good cause, or when it finds it unnecessary to require full compliance with this part to carry out its regulatory functions, may relieve a carrier from full compliance with this part, and may require such carrier to submit other data as the Commission deems necessary: Provided, however, That all applications seeking release from compliance with this part must be accompanied by a list of the data which the carrier proposes to submit in lieu of the required reports, or the data itself.

[§322:157] §511.7 WAIVER FOR CARRIERS WITH LESS THAN \$25,000 GROSS REVENUE.—The Commission upon an application and showing that any carrier subject to this part has earned less than \$25,000 gross revenue for any one reporting period as provided in this part, may relieve such carrier from filing any report for such reporting period.

PROPOSED RULE MAKING
[DOCKET NO. 1152]

FEDERAL MARITIME COMMISSION
[46 CFR Ch. IV]
[Docket No. 1152]

Semiannual Reporting by Carriers in Domestic
Offshore Trades

Notice of Proposed Rulemaking

Pursuant to the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. 1003) and section 43 of the Shipping Act, 1916, as amended (46 U.S.C. 841(a)), notice is hereby given that the Federal Maritime Commission proposes to promulgate rules which will require vessel operating common carriers by water in the domestic offshore trades to file with the Commission semiannual statements setting forth rate bases and income accounts for each regulated trade in which operations are performed. The proposed rules are set forth below.

SECTION 1. *Purpose.* The purpose of these rules is to require the filing of additional information by common carriers by water subject to the Commission's General Order 5 (46 CFR Part 511) so that the Commission will be able to expedite the discharge of its duties under the Intercoastal Shipping Act, 1933.

SEC. 2. *Authority.* These rules are issued pursuant to authority vested in the Commission by sections 18, 21, and 43 of the Shipping Act, 1916, as amended, and sections 2, 4, and 7 of the Intercoastal Shipping Act, 1933.

SEC. 3. *General requirements.* (a) All persons engaged in the operation of vessels in the common carriage of per-

sons or property in the domestic offshore trades (except persons engaged in intrastate operations in Alaska and Hawaii) and required by the Intercoastal Shipping Act, 1933, as amended, to file tariffs with the Federal Maritime Commission shall execute and file, in triplicate, with the Secretary of the Federal Maritime Commission, statements of rate base and income account for each domestic offshore trade served by the carrier. The trade, as a defined term used herein, is limited to the carriage of cargo in a domestic offshore trade under the terms of tariffs on file with the Federal Maritime Commission, except for the permitted inclusion of other revenues within the 5 percent limitation set forth under income account (section 7(c)(1)). Statements of rate base and income account shall be filed every 6 months after the initial statements which shall be filed as follows:

(1) For carriers whose fiscal year coincides with the calendar year, the first filing shall cover the entire calendar year 1963 and the statements shall be filed within 120 days after December 31, 1963.

(2) For carriers with a fiscal year ending on any date from July 1, 1963, to December 30, 1963, inclusive, the first filing shall cover the last 6 months of such fiscal year and the statements shall be filed within 120 days after the last day of the fiscal year or within 120 days of the date of this order, whichever is later.

(3) For carriers with a fiscal year ending on any date from January 1 to June 30, 1964, inclusive, the first filing shall cover the entire fiscal year and the statements shall be filed within 120 days after the last day of the fiscal year.

(b) After the first filing, annual statements shall be filed within 120 days after the close of the carrier's fiscal year; half-year statements shall be filed within 90 days after the end of the first 6 months of the carrier's fiscal year.

(c) Upon application, the Commission may grant reasonable extensions of the time limit prescribed by this sec-

tion for filing the statements and data required by this Part: *Provided*, That (1) the application therefor is received 15 days before the statements and data are due; (2) the application sets forth good and sufficient reasons to justify the extension requested; (3) the application states a specific date on or before which the statements or data will be filed; and (4) the application is not construed as constituting relief from possible penalties for tardy filing, unless it is granted.

(d) Where it is necessary to allocate property, revenue, costs, and expenses to the trade, the allocation shall be on a direct basis, if practicable, and if not, in the manner prescribed herein (section 7).

(e) All carriers subject to these reporting requirements must comply fully with the instructions outlined herein, both as to the submission of the specified reports and as to compliance with the methods prescribed for their preparation. The carrier, however, may present additional material by way of alternative methods of allocation or other approaches to the problems inherent in this type of reporting. When such additional material is submitted, the methods used shall be explained and fully supported.

(f) The establishment of the rules and regulations prescribed in the succeeding sections hereof is without prejudice to the right of the Federal Maritime Commission to employ other bases for allocation and calculation in any instance where the results produced by the application of such rules and regulations create unreasonable results.

(g) With respect to the annual statements, all data must be based on amounts shown in the appropriate annual financial statements filed with the Federal Maritime Commission in compliance with General Order 5.

(h) All calculations required by allocations herein shall be carried to five places beyond the decimal point, e.g., 97.53821 percent.

SEC. 4. *Affidavit.* The data required by these rules as set forth in the prescribed statements shall be accompanied by an affidavit of the corporate officer responsible for the maintenance and accuracy of the books, accounts, and financial records of the carrier, to the effect that:

(a) The books or accounts have been maintained in accordance with the appropriate system of accounts, and

(b) The exhibits and schedules prescribed herein have been prepared from the books and records of the carrier in accordance with this order.

SEC. 5. *Access to working papers.* All working papers (irrespective of by whom prepared) in support of all exhibits and schedules submitted, as well as the books and records of the carrier, shall be made available upon request for examination by auditors representing the Federal Maritime Commission, and said auditors shall be permitted to make copies of such records to the extent they deem necessary.

SEC. 6. *Definitions.* Various expressions, terms, and designations used herein may or may not have additional meanings or usage. For the purposes of this regulation, however, these terms are expressly limited to the following:

"Domestic Offshore Trade" means that trade carried on by common carriers by water operating (1) between the United States and its territories and possessions, (2) between or within those territories and possessions, (3) between Continental U. S. and Hawaii and Alaska, (4) between, but not within, Hawaii and Alaska.

"The Trade" means the carriage by common carriers by water of cargo in the domestic offshore trade under the terms of tariffs on file with the Federal Maritime Commission.

"The Service" means all voyages performed by common carriers by water on which any cargo was carried in The Trade.

“Other Services” means all voyages performed by common carriers by water on which no cargo was carried in The Trade.

“Revenue Tons” means those tons, either weight or measurement, on which freight revenues are calculated. For the purposes of this regulation a weight ton is 2,240 lbs., and a measurement-ton is 40 cubic feet.

“Revenue Ton-Mile” means the product of the revenue tons carried between each port of origin and destination, multiplied by the number of nautical miles representing the shortest navigable distance between the two ports as set forth in either:

(1) “Table of Distances Between Ports”—United States Navy Department, Hydrographic Office;

(2) “Distances Between United States Ports”—U. S. Department of Commerce, Coast and Geodetic Survey. For the purposes of this regulation, revenue tons related to revenues earned from the carriage of mail, which is treated herein as a reduction of costs, shall be excluded from the revenue ton-mile calculations.

“Revenue Ton-Mile Relationship” is used for the purpose of making certain allocations herein. Revenue ton-miles summarized by types of cargo such as The Trade, military, foreign, and contract cargoes, determines the revenue ton-mile relationship of each to the total.

“Voyage” means a completed round voyage from port of origin and return to port of origin. In no case shall voyages be split to reflect outward and inward services separately.

“Terminated Voyage” means a voyage that from an operational standpoint is finished. Voyages are generally considered to be terminated on the completion of one of the following operations or events:

- (1) The latest of:
 - (i) Crew paid off

(ii) Discharge of last of homeward cargo

(iii) Completion of repairs (excluding annual overhaul and emergency repairs) or

(2) Midpoint in time of operations simultaneously loading and unloading cargo

Usually this will be considered to have happened at noon or midnight of the day on which the determining operation is completed.

“Vessel Operating Expense” means:

(1) for those carriers required to file FMC—64 (line 56 of schedule 3002 of that report), the total of all operating expense: Terminated voyages, plus port, cargo, brokerage and other voyage expense, less revenue from passengers, net of passenger brokerage, revenue from mail, and other voyage revenue.

(2) for those carriers required to file reports FMC—63, basically the same data as outlined in (1) above, but in the format and detail set forth in schedule VI(A).

“Vessel Operating Expense Relationship” means the ratio that “total vessel operating expense” allocated to the trade bears to “total vessel operating expense” of all trades and services of the carrier for the reporting period.

SEC. 7. *Forms and instructions*—(a) *General*. (1) The information shall be submitted in the form of the prescribed exhibits and schedules and shall consist of:

Exhibit I, rate base and supporting schedules and

Exhibit II, income account and supporting schedules for the appropriate period as prescribed herein.

(2) The required exhibits and schedules are described in the following paragraphs. Pro forma statements have been prepared by the Commission and may be obtained upon request from the Director, Bureau of Financial Analysis, Federal Maritime Commission, Washington, D. C., 20573. These pro forma statements are based on the uni-

form system of accounts for maritime carriers prescribed by the Maritime Administration and the Interstate Commerce Commission. For those carriers who are required to file Report Form FMC-63, a means has been provided whereby the accounts prescribed by the Interstate Commerce Commission for carriers by inland and coastal waterways may be reconciled with the requirements of these statements. For such carriers, alternative schedules IV, VI, VII, and VIII have been provided, each identified by suffix A.

(b) *Rate Base (Exhibit I)*—(1) *Investment in Vessels (Schedule I)*. Each vessel, excluding chartered vessels, employed in the trade for which a statement is filed shall be listed by name and type showing the original cost to the company, or any company related thereto, plus the cost of betterments, conversions, and alterations, less the cost of any deductions as of the beginning of the year. All additions and deductions made during the reporting period shall be shown gross and on a pro rata basis reflecting the number of days they were actually in use during the period. The result of these computations shall be called adjusted cost. Where any of the above figures differ from those reported in Schedule 222 or 2020, respectively, of the annual financial statements FMC-63 or FMC-64 or from those reported in Federal income tax returns, the differences shall be set forth and fully explained.

(i) The vessels employed in the trade may be subdivided into two categories:

(A) Those vessels employed exclusively in the service for the entire period, inclusive of normal periodic lay-ups, and which at no time during the period carried any cargo other than in the service. For such vessels, the adjusted cost shall be included in the total to be allocated on the revenue ton-mile relationship as set forth below.

(B) Those vessels employed in the service for less than the entire period. For such vessels the adjusted cost shall be allocated between the service and other services on the

basis of the relationship that the number of days in each bears to the total of both. The total number of days thereby derived will not normally equal the number of days in the reporting period because lay-up days are not included. Lay-up days of vessels in this category shall normally be assigned between the respective services on the same basis as that employed in allocating the adjusted costs of such vessels, i.e., active days. However, if one or more of the vessels normally employed in the service have been diverted temporarily to other services in lieu of incurring lay-up expense, no assignment of lay-up time to other services is required. On the other hand, if a vessel or vessels are permanently withdrawn from the service and laid-up pending disposition, the period of lay-up shall be assigned to other services. In summary, an inequitable amount of lay-up days shall not be assigned to the service or to the trade. That portion of the adjusted cost of the vessels not allocated to other services shall be included in the total to be allocated on the revenue ton-mile relationship.

(ii) The total of the adjusted cost of all vessels employed in the service during the period which has not been allocated to other services, as required in (b)(1)(i)(A) above, shall be distributed between regulated cargo (the trade) and other cargo on a revenue ton-mile relationship.

(iii) Where the service of the carrier is solely between ports in the continental United States and domestic offshore ports, and where there are no significant differences between the distances from the various continental ports and the several domestic offshore ports and the ocean rates between said ports are identical, the revenue ton relationship may be used in lieu of the revenue ton-mile relationship.

(iv) Revenue derived from the carriage of passengers, mail, and other services, which is treated herein as a reduction of costs (section 7(c)(2)(iii)) and the revenue tons from which such revenue is derived shall be excluded from the revenue ton-mile calculations required herein.

(2) *Reserve for Depreciation—Vessels (Schedule II).*

(i) Each vessel, excluding chartered vessels, shall be listed separately showing for each its depreciable life and residual value used for depreciation purposes. The accumulated reserve for depreciation as at the beginning of the year shall be reported and shall be allocated to the various services, trades, and classes of cargo in the same manner and in the same proportion as is the cost of the vessel in Schedule I. When any of the amounts required herein are different from those reported in Schedule 282 or 2021, respectively, of the annual financial statements FMC-63 or FMC-64, or from those reported in Federal income tax returns, the differences shall be set forth and fully explained. If the depreciable life of any equipment installed on vessels differs from that of the vessel, the cost thereof and the depreciation basis shall be set forth separately.

(ii) For any vessels disposed of during the reporting period, a deduction shall be made representing a daily prorate of the proportion of the period following the date of disposal corresponding to the similar deduction made in Schedule I.

(3) *Other Property and Equipment—Net (Schedule III).* (i) Actual investment, representing cost to the carrier or any company related thereto, in other fixed assets employed in the trade, less accumulated reserve for depreciation, both as at the beginning of the year, adjusted by a daily prorate of additions and deductions shall also be reported. Assets may be grouped in major categories, preferably as required by the appropriate annual financial statements. Within each major category individual items with a cost of \$10,000 or more shall be listed separately. The basis of allocation to the rate base of each item reported shall be set forth and shall be based upon the use thereof within the trade. Any computations of percentages employed shall also be set forth. Assets employed in a general capacity, such as office furniture and fixtures, shall be allocated in the ratio of total vessel operating expense allocated to the trade, as required by Schedule V, to the

total vessel operating expense of all trades and services of the carrier for the year.

(ii) The depreciable lives of the major categories of assets reported in this classification shall be set forth.

(iii) when any of the amounts required herein are different from those reported in the annual financial statements or from those reported in the Federal income tax returns, the differences shall be set forth and fully explained.

(4) *Working Capital (Schedule IV)*. Working capital shall be included on the average voyage expense basis computed as follows:

(i) Average voyage expense shall be determined on the basis of the actual expenses of operating and maintaining the vessels employed in the service (excluding lay-up expenses) for a period represented by the average length of time of all round voyages (excluding lay-up periods) terminated during the period on which any cargo was carried in the trade. The expense of operating and maintaining the vessels employed in the service shall include administrative and general expense (Accounts 900-955 less Accounts 670 and 895) allocated to the service in accordance with section 7(c)(4) hereof and total vessel operating expense—terminated voyages (Accounts 701-799 inclusive). For this purpose if the average voyage, as determined above, is of less than 90 days' duration, the expense of hull and machinery and P & I insurance (Accounts 755 and 757, respectively) shall be determined to be that for 90 days; provided, that such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the accounting period.

(ii) The determination shall be made in the following manner:

First, by dividing the sum of such expenses for the accounting period involved applicable to the vessels in the service by the aggregate number of days consumed in all voyages of such vessels in the service terminating during such period;

Second, by multiplying the quotient thus obtained by the number of days (excluding lay-up days) in the average voyage in the service; and,

Third, by multiplying the resulting product by the quotient of the total number of days (excluding lay-up days) consumed in voyages of vessels in the service terminating during the accounting period divided by the number of calendar days within the accounting period.

(iii) Where vessel operating expense is allocated as provided hereinafter (section 7(c)(2)), working capital shall be computed on the basis of vessel operating expense of the service and then allocated on the gross vessel operating expense basis to the trade. This schedule is not required of those carriers who annually file Form FMC-63 with the Federal Maritime Commission.

(5) *Working Capital (Schedule IV(A))*. Total current assets less total current liabilities shall be set forth as shown in the annual financial statements, FMC-63, as of the beginning of the period. The net working capital derived thereby shall be allocated to the trade in the relationship that vessel operating expense allocated to the trade bears to total vessel operating expense for the company, both as shown on Schedule IV(A).

(6) *Other assets*. Any other assets claimed by the carrier as components of its rate base shall be set forth separately and related to amounts shown in the annual financial statements. The basis of allocation to the trade shall be fully explained and supported by computations of percentages employed.

(7) *Property and equipment of related companies*. Exhibit I provides for the reporting of property and equipment of related companies used in the trade. Where such assets owned by related companies are used in the trade, the profits of such related companies from such use shall be included in the income account, and an appropriate allocation of the depreciated cost of such assets as reflected on

the books of such related companies may be included in the rate base. The basis of allocating such net depreciated cost to the trade shall be set forth and fully explained in a schedule similar to Schedule III.

(c) *Income Account (Exhibit II)*—(1) *Operating Revenue (Schedule V)*. (i) Revenue allocated to the trade shall include only revenue earned from the common carriage of cargo in the domestic offshore trade on voyages terminated during the period, except that military, contract, and foreign cargo need not be excluded provided the revenue derived is not in excess of 5 percent of the total revenue. This 5 percent limitation shall be applied separately to each class of cargo. Revenue tons and amounts for the major classes of commodities carried shall be reported separately for each individual commodity of which 1,000 or more revenue tons are transported.

(ii) When any of the amounts reported in the Income Account are different from those reported in the annual financial statements, the differences shall be set forth and fully explained.

(2) *Vessel Operating Expense (Schedule VI)*. A vessel operating expense summary of voyages terminated during the period, including all voyages in which any cargo was carried in the trade, shall be submitted setting forth allocations to the trade on the following bases:

(i) Total vessel expense shall be allocated where an allocation is necessary to the trade on the revenue ton-mile basis. This procedure will be required for all voyages in the service, as defined herein (section 6). Should any of the elements of vessel expense be directly allocable to specific cargo, such direct allocations should be made and explained.

(ii) Port, cargo, freight brokerage, and other voyage expenses, by ports at which incurred, shall be allocated directly to the extent practicable or otherwise on the revenue ton basis.

(iii) Passenger revenue less passenger brokerage, revenue from mail, and other voyage revenue shall be deducted from vessel operating expense and distributed on the revenue ton-mile basis.

(3) *Vessel Operating Expense (Schedule VI (A))*. This schedule is to be submitted by carriers whose vessels are not self-propelled and who report annually to the Federal Maritime Commission on Form FMC-63. It is designed to summarize the operating results and to provide for allocations to the trade where necessary because of the simultaneous carriage of unregulated cargo. The principles of allocation are the same as those required by Schedule VI.

(4) *Administrative and General Expense (Schedules VII and VII (A))*. Administrative and general expense less agency fees, commissions, and brokerage earned shall be allocated to the trade in the proportion that the gross vessel operating expenses incurred in the trade bears to the gross vessel operating expense for all trades and services. Direct allocations may be made, where practicable, particularly with respect to advertising expense related to the operation of passenger and combination vessels. Any direct allocation shall be explained in detail and set forth in an appropriate schedule.

(5) *Other Shipping Operations (Schedule VIII)*. Terminal, cargo handling, tug and lighter, and other shipping operations shall be allocated to the trade on a tonnage or volume basis as a measure of use and shall be made separately by ports at which incurred. The methods used shall be explained and fully supported. If interdepartmental credits for services and facilities are used by the carrier, such credits shall be allocated so as to offset the related contra charges included in the voyage accounts. Revenues earned from services performed for others, unrelated to the trade, and the related costs and expenses shall not be allocated to the trade.

(6) *Other Shipping Operations (Schedule VIII (A))*.
(i) Items related to shipping classified on Schedule VIII

(A) as other shipping operations shall be allocated to the trade on tonnage or volume basis, where applicable, as a measure of use and shall be made separately by ports at which incurred. The methods used shall be explained and fully supported.

(ii) Interdepartmental debits and credits shall be offset as explained under Schedule VIII, above.

(iii) Revenues earned from services performed for others, unrelated to the trade, and related costs and expenses shall not be allocated to the trade.

(7) *Inactive Vessel Expense (Schedule IX)*. Inactive vessel expense shall, in general, be allocated on the same basis as the investment in each vessel is included in the rate base. However, when a vessel is definitely assigned to the trade any inactive vessel expense for that vessel may be allocated to the trade. If such a vessel be temporarily chartered out to minimize lay-up expense, no lay-up expense incurred before or after such charter period need be allocated to the charter. Inactive vessel expense applicable to vessels not used in the trade or withdrawn from the trade shall be excluded. (See instructions (b)(1)(i)(B) applicable to Schedule I pertaining to the allocation of lay-up time.)

(8) *Depreciation (Schedule X)*. Depreciation of assets included in the rate base shall be allocated on the same bases as the specific assets.

(9) *Other*. Any other elements of income or expense wholly or partially applicable to the trade shall be fully explained and supported by a schedule showing details of allocation and reconciliation with amounts shown in the annual financial statements.

(10) *Federal income tax*. Federal income taxes allocated to the trade shall be set forth together with the details of the computation thereof.

(11) *Profits of related companies.* Net income, after Federal income taxes, earned by related companies of the carrier in performing services for the carrier in the trade shall be included in an appropriate manner. The basis of allocation of such net income shall be direct where practicable and shall be fully explained and supported by details showing the basis of allocation.

(12) *Additional required information.* The following information shall also be furnished:

(i) A statement summarizing the outstanding long-term debt with related interest rates and accruals for the period including an identification of any debts secured by assets included in the rate base.

(ii) A description of the pattern of service with respect to routes, number and type of vessels employed, regularity of sailing dates, turn-around time, itineraries, etc.

(iii) Surplus adjustments recorded since the latest annual financial statements in sufficient detail to permit the recognition of the significance of such adjustments as related to the trade.

Interested parties may submit such written data, views, or arguments as they desire. Communications should be submitted in original and 15 copies to the Secretary, Federal Maritime Commission, Washington, D. C., 20573. All communications received within 60 days after publication of this notice in the FEDERAL REGISTER will be considered before action is taken by the Commission. No public hearing is contemplated at this time.

By order of the Commission October 15, 1963.

THOMAS LISI,
Secretary.

[F.R. Doc. 63-11192; Filed, Oct. 22, 1963; 8:47 a.m.]

Title 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers
and Related Activities

[Docket No. 1152; General Order 11]

Part 512—Reports of Rate Base and Income Account by
Vessel Operating Common Carriers in the Domestic Off-
shore Trades

On October 23, 1963, the Federal Maritime Commission published proposed rules on semiannual reporting by carriers in the domestic offshore trades in the *FEDERAL REGISTER* (28 F.R. 11318). Written comments on the proposed rules were invited and received from interested parties.

The Commission has carefully considered the written comments which were submitted and are on file with the Commission. Certain of these comments have been adopted or substantially satisfied by editorial changes, deletions from, or additions to the rules. Essentially, due to the easing of the requirements as to mid-year reporting, commodity data, other asset detail, and the reporting of other items, a significant reduction in the requirements of the rules has been accomplished. Other comments pertain to: (1) The equity of the Revenue Ton-Mile Relationship. Since no reasonable substitute has been suggested, the ton-mile provision has been left unchanged.

(2) The Revenue Ton-Mile Relationship, in that it does not consider sea time versus port time for vessels, and is therefore inaccurate. This requirement was rejected for overall application since it would impose an added burden on the carriers. Further, filing on this basis can be accomplished under the alternate methods provision (§512.3(e)).

(3) The propriety of the rate base requirements utilizing the depreciated cost basis for the valuation of vessels

and the average voyage expense as a measure of working capital. Since these suggestions run contrary to published decisions of the Commission, they are rejected.

(4) The claim that this type of reporting will result in the establishment of inflexible rules to be used in future rate determinations. This is rejected since the rules (§512.3(e)) specifically permit the filing of alternative data and also that the Commission may "employ other bases for allocation and calculation" where the prescribed methods "create unreasonable results".

(5) The time for filing. The 120-day period has not been changed since provision has been made for the granting of extensions where justified.

(6) The provision for certain minima as relieving reporting requirements. None of the suggestions submitted appear to be realistic, however, a basis has been provided for the granting of a waiver of reporting requirements or the acceptance of alternative data in lieu thereof.

(7) Oral hearings. The Commission has appraised the reasons given in justification for such hearings and finds them unwarranted.

(8) The need to consider operating subsidy refunds. The Commission has considered this item and believes that the methods prescribed herein appropriately allocate all applicable revenues and expenses to the domestic offshore trades and that no special consideration of operating subsidy accruals or refunds is necessary.

The purpose of these rules is to require the filing of additional information by common carriers by water subject to the Commission's General Order 5 (46 CFR Part 511) so that the Commission will be able to expedite the discharge of its duties under the Intercoastal Shipping Act, 1933.

Therefore, pursuant to sections 18, 21, and 43 of the Shipping Act, 1916, and sections 2, 4, and 7 of the Intercoastal Shipping Act, 1933, Title 46, CFR, is hereby amended by inserting a new Part 512, as follows:

Sec.

- 512.1 Purpose.
- 512.2 Authority.
- 512.3 General requirements.
- 512.4 Affidavit.
- 512.5 Access to working papers.
- 512.6 Definitions.
- 512.7 Forms and instructions.

AUTHORITY: The provisions of this Part 512 issued pursuant to secs. 18, 21, and 43 of the Shipping Act, 1916; 46 U.S.C. 817, 820 and 841(a); secs. 2, 4, and 7 of the Intercoastal Shipping Act, 1933; 46 U.S.C. 844, 845(a), and 847.

§512.1 PURPOSE.

The purpose of the rules in this part is to require the filing of additional information by common carriers by water subject to the Commission's General Order 5 (Part 511 of this chapter) so that the Commission will be able to expedite the discharge of its duties under the Intercoastal Shipping Act, 1933.

§512.2 AUTHORITY.

The rules in this part are issued pursuant to authority vested in the Commission by sections 18, 21, and 43 of the Shipping Act, 1916, as amended, and sections 2, 4, and 7 of the Intercoastal Shipping Act, 1933.

§512.3 GENERAL REQUIREMENTS.

(a) All persons engaged in the operation of Cargo Vessels in the common carriage of persons or property in the Domestic Offshore Trades (except persons engaged in intrastate operations in Alaska and Hawaii) and required by the Intercoastal Shipping Act, 1933, as amended, to file tariffs with the Federal Maritime Commission shall execute and file, in triplicate, with the Secretary of the Federal Maritime Commission, Statements of Rate Base and Income Account

for each Domestic Offshore Trade served by the carrier. Initial statements of Rate Base and Income Account shall be filed as follows:

(1) For carriers whose fiscal year coincides with the calendar year, the first filing shall cover the entire calendar year 1963 and the statements shall be filed within 90 days after promulgation of this part;

(2) For carriers with a fiscal year ending on any date from July 1, 1963, to December 30, 1963, inclusive, the first filing shall cover the entire fiscal year and the statements shall be filed within 90 days after promulgation of this part; and

(3) For carriers with a fiscal year ending on any date from January 1 to June 30, 1964, inclusive, the first filing shall cover the entire fiscal year and the statements shall be filed within 150 days after the last day of the fiscal year.

(b) After the first filing, annual statements shall be filed within 150 days after the close of the carrier's fiscal year.

(c) Upon application the Commission may:

(1) Grant reasonable extensions of the time limit prescribed by this section for filing the statements and data required by this part; *Provided, That:*

(i) The application therefor is received 15 days before the statements and data are due;

(ii) The application sets forth good and sufficient reasons to justify the extension requested;

(iii) The application states a specific date on or before which the statements and data will be filed; and

(iv) The application is not construed as constituting relief from possible penalties for tardy filing, unless granted;

(2) If the application is filed not less than 60 days before the statements and data under this part are due, and upon a showing of good cause, or when it finds it unnecessary to

require full compliance with this part to carry out its regulatory functions, relieve a carrier from full compliance with this part, and require such carrier to submit other data as the Commission deems necessary: *Provided, however,* That all applications seeking release from compliance with this part must be accompanied by a list of the data which the carrier proposes to submit in lieu of the required statements, or the data themselves;

(3) Upon showing that any carrier subject to this part has earned less than \$25,000 gross revenue in the Trade for its fiscal year as provided in this part, relieve such carrier from filing any statements for such fiscal year; and

(d) The Commission may require a carrier to file the statements and data required by this part for the first 6 months of any fiscal year unless the carrier files within 30 days after the close thereof with the Federal Maritime Commission a certification to the effect that no significant changes have taken place during such period in route(s), service(s), number of vessels employed, types of vessels employed, costs of operations, volume of cargo carried, and amount of revenue earned. Such statements and data, if required, shall be filed within 90 days after the end of the first 6 months of the carrier's fiscal year.

(e) Where it is necessary to allocate property, revenue (except net passenger and other voyage revenue), costs and expenses, the allocation shall be on a direct basis, if practicable, and if not, in the manner prescribed in section 7 of this part.

(f) All carriers subject to these reporting requirements must comply fully with the instructions outlined herein, both as to the submission of the specified reports and as to compliance with the methods prescribed for their preparation. The carrier, however, may present additional material by way of alternative methods of allocation or other approaches to the problems inherent in this type of reporting. When such additional material is submitted, the methods used shall be explained and fully supported.

(g) The establishment of the rules and regulations prescribed in the succeeding sections hereof is without prejudice to the right of the Federal Maritime Commission to employ other bases for allocation and calculation in any instance where in its opinion the application of such rules and regulations create unreasonable results.

(h) With respect to the annual statements required by this part, all data must be based on amounts shown in the annual financial statements filed with the Federal Maritime Commission in compliance with General Order 5 (Part 511 of this chapter).

(i) All calculations required by allocations herein shall be carried to 2 places beyond the decimal point, e.g., 97.54 percent.

§512.4 CERTIFICATION.

The data required by this part shall be accompanied by a certification of the corporate officer responsible for the maintenance and accuracy of the books, accounts, and financial records of the carrier that:

(a) The books and accounts have been maintained in accordance with an appropriate system of accounts; and

(b) The exhibits and schedules have been prepared from the books and records of the carrier in accordance with this part.

§512.5 ACCESS TO WORKING PAPERS.

All working papers (irrespective of by whom prepared) in support of all exhibits and schedules submitted, as well as the books and *records* of the carrier, shall be made available upon request for examination by *auditors* representing the Federal Maritime Commission, and said *auditors* shall be permitted to make copies of such records to the extent they deem necessary. (emphasis added)

§512.6 DEFINITIONS.

Various expressions, terms, and designations used herein may or may not have additional meanings or usage. For the purposes of this part, however, these terms are expressly limited as follows:

(a) "Domestic Offshore Trade" means that trade carried on by common carriers by water operating: (1) Between the United States and its territories, possessions, and Puerto Rico; (2) Between or within those territories, possessions, and Puerto Rico; (3) between continental United States and Hawaii and Alaska; and, (4) between, but not within, Hawaii and Alaska.

(b) "The Service" means all Voyages of Cargo Vessels performed by common carriers by water on which any cargo was carried in The Trade.

(c) "The Trade" means the carriage in The Service in Cargo Vessels by common carriers by water of cargo in the Domestic Offshore Trade under the terms of tariffs on file with the Federal Maritime Commission: *Provided, however*, That if the gross revenue derived from the carriage of Other Cargo does not exceed 5 percent of the gross revenue derived from The Service, no segregation of revenue and expenses within The Service is required by this part.

(d) "Other Cargo" means the carriage in The Service in Cargo Vessels of mail and any cargo other than that in The Trade: *Provided, however*, That if the gross revenue derived from the carriage of Other Cargo exceeds 5 percent of the gross revenue derived from The Service, segregation of revenue and expenses related thereto within The Service is required by this part.

(e) "Other Services" means all Voyages performed by common carriers by water on which no cargo was carried in The Trade.

(f) "Cargo Vessel" means a self-propelled or non-self-propelled vessel which carries cargo, but does not include a vessel which carries or is authorized to carry more than 12 passengers.

(g) "Revenue Tons" means those tons, either weight or measurement, on which freight revenues are calculated. For the purposes of this part, a weight ton may be either 2,240 pounds or 2,000 pounds and a measurement ton shall be 40 cubic feet. Each carrier must use a consistent basis of weight measurement in making Revenue Ton or Revenue Ton-Mile calculations, and the reports filed must clearly indicate the basis used.

(h) "Revenue Ton Relationship" means the relationship between Revenue Tons for all cargo carried in The Trade, on the one hand, and the total Revenue Tons for all cargo carried in The Service on the other.

(i) "Revenue Ton-Mile" means the product of the Revenue Tons carried between each port of origin and destination, multiplied by the number of nautical miles representing the shortest navigable distance between the two ports as set forth in either:

(1) "Distances Between Ports"—Department of the Navy, Oceanographic Office; or,

(2) "Distances Between United States Ports"—U. S. Department of Commerce, Coast and Geodetic Survey.

(j) "Revenue Ton-Mile Relationship" means the relationship between Revenue Ton-Miles for all cargo carried in The Trade, on the one hand, and the total Revenue Ton-Miles for all cargo carried in The Service on the other. Normally the total of all Revenue Ton-Miles in The Service will be a figure of considerable magnitude; therefore, it is suggested that three digits be dropped from the total. This then would provide the data in terms of thousands of ton-miles.

(k) "Voyage" normally means a completed round voyage from port of origin and return to port of origin.

In no case shall a Voyage be split to reflect outward and inward services separately. However, when a vessel is reassigned to a new United States basing point, then the Voyage is from the old United States port of origin to the new United States port of origin. Where a vessel performs outbound in The Service and then proceeds to charter, the Voyage will be considered to be terminated upon completion of the discharge of the last cargo in The Service. The requirement respecting commencement and termination of a completed round Voyage by a carrier party to an operating differential subsidy agreement may be observed by such carrier for the purposes of this part. Voyages generally are considered to be terminated on the completion of one or the other of the following operations or events:

- (1) The latest of:
 - (i) Crew paid off;
 - (ii) Discharge of last of homeward cargo; or
 - (iii) Completion of repairs (excluding annual overhaul and emergency repairs); or

- (2) Midpoint in time of operations simultaneously loading and unloading cargo.

Usually this will be considered to have happened at noon or midnight of the day on which the determining operation is completed.

(1) "Vessel Operating Expense" means:

- (1) For those carriers required to file FMC-64, the total of operating expense—terminated voyages, plus port, cargo, brokerage, and other voyage expense, less other voyage revenue and revenue from passengers net of passenger brokerage.

- (2) For those carriers required to file FMC-63, basically the same data as outlined in subparagraph (1) of this paragraph, but in the format and detail set forth in Schedule VI(A).

(m) "Vessel Operating Expense Relationship" means the relationship between total vessel operating expense allocated to The Trade, on the one hand, and total vessel operating expense of all trades and services of the carrier on the other, both for the period.

(n) "Related Companies" means companies or persons that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the accounting carrier. The term "Control" (in reference to a relationship between any person or persons and another person or persons), shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

§512.7 FORMS AND INSTRUCTIONS.

(a) *General.* (1) The information required by this part shall be submitted in the form of the prescribed exhibits and schedules and shall consist of:

Exhibit A, Rate Base and supporting schedules, and
Exhibit B, Income Account and supporting schedules.

(2) The required exhibits and schedules are described in the following paragraphs. Pro forma statements have been prepared by the Commission and may be obtained upon request from the Director, Bureau of Financial Analysis, Federal Maritime Commission, Washington, D. C., 20573. These pro forma statements are based on the Uniform System of Accounts for Maritime Carriers prescribed by the Maritime Administration and the Interstate Commerce Commission. For those carriers who are required to file FMC-63, a means has been provided whereby the accounts prescribed by the Interstate Commerce Commis-

sion for Carriers by Inland and Coastal Waterways may be reconciled with the requirements of these statements. For such carriers, alternative Schedules IV, VI, VII, and VIII have been provided, each identified by suffix (A).

(b) *Rate Base (Exhibit A)*—(1) *Investment in Vessels (Schedule I)*. Each Cargo Vessel, excluding chartered vessels, employed in The Service for which a statement is filed shall be listed by name and type showing the original cost to the carrier, or to any Related Company, plus the cost of betterments, conversions, and alterations, less the cost of any deductions as at the beginning of the year. All additions and deductions made during the period shall be shown gross and on a pro rata basis reflecting the number of days they were actually in use during the period. The result of these computations shall be called Adjusted Cost. Where any of the above figures differ from those reported in Schedule 222 or 2020, respectively, of the annual financial statements FMC-63 or FMC-64, or from those reported for Federal income tax purposes, the differences shall be set forth and fully explained.

(i) The Cargo Vessels employed in The Service may be subdivided into two categories:

(a) Those Cargo Vessels employed exclusively in The Service for the entire period, inclusive of normal periodic lay-ups, and which at no time during the period performed Voyages other than in The Service. For such vessels, the Adjusted Cost shall be included in the total to be allocated to The Trade.

(b) Those Cargo Vessels employed in The Service for less than the entire period. For such vessels the Adjusted Cost shall be allocated between Voyages in The Service and Voyages in Other Services on the basis of the relationship that the number of days in each bears to the total of both. The total number of days thereby derived will not normally equal the number of days in the reporting period because lay-up days are not included. Lay-up days of vessels in

this category will normally be assigned between the respective services on the same basis as that employed in allocating the Adjusted Costs of such vessels, i.e., active days. However, if one or more of the vessels normally employed in The Service have been diverted temporarily to Other Services in lieu of incurring lay-up expense, no assignment of lay-up time to Other Services is required. On the other hand, if a vessel or vessels are permanently withdrawn from The Service and laid-up pending disposition, the period of lay-up shall be assigned to Other Services. In summary, an inequitable amount of lay-up days shall not be assigned to The Service or to The Trade. That portion of the Adjusted Cost of the vessels not allocated to Other Services shall be included in the total to be allocated to The Trade.

(ii) The total of the Adjusted Cost of all vessels employed in The Service during the period which has not been allocated to Other Services, as required in subdivision (i)(b) of this subparagraph, shall be distributed between The Trade and Other Cargo in the Revenue Ton-Mile Relationship.

(iii) Where the service of the carrier is solely between ports in the continental United States and domestic offshore ports, and where there are no significant differences between the distances from the various continental ports and the several domestic offshore ports, and the ocean rates between said ports are identical, the Revenue Ton Relationship may be used in lieu of the Revenue Ton-Mile Relationship.

(iv) Revenue derived from the carriage of passengers and other services which is treated herein as a reduction of costs paragraph (c)(2)(iii) of this section and the Revenue Tons from which such revenue is derived shall be excluded from the Revenue Ton-Mile calculations required herein.

(2) *Reserve for Depreciation—Vessels (Schedule II).*

(i) Each Cargo Vessel, excluding chartered vessels, employed in The Service shall be listed separately showing for each its depreciable life and residual value used for depreciation purposes. The accumulated reserve for depre-

ciation as at the beginning of the year shall be reported and shall be allocated to The Service and to The Trade in the same manner and in the same proportion as is the cost of the vessel in Schedule I. When any of the amounts reported in Schedule 282 or 2021, respectively, of the annual financial statements FMC-63 or FMC-64, or from those reported for Federal income tax purposes, the differences shall be set forth and fully explained. If the depreciable life of any equipment installed on vessels differs from that of the vessel, the cost thereof and the depreciation basis shall be set forth separately.

(ii) For any vessels disposed of during the period, a deduction shall be made representing a daily proportion of the period following the date of disposal corresponding to the similar deduction as required by subparagraph (1) of this paragraph.

(3) *Other Property and Equipment—Net (Schedule III).* (i) Actual investment, representing original cost to the carrier, or to any Related Company, in other fixed assets employed in The Service and accumulated reserves for depreciation, both as at the beginning of the year, shall be set forth. Additions and deductions during the period shall also be reported, and the carrier may assume that all such changes took place at mid-year except for those involving substantial sums which shall be prorated on a daily basis. Assets shall be grouped in major categories as required by the appropriate annual financial statements FMC-63 or FMC-64. The basis of allocation to the rate base of each item reported shall be set forth and shall be based upon the use thereof within The Trade. Any computations of percentages employed shall also be set forth. Assets employed in a general capacity, such as office furniture and fixtures, shall be allocated to The Trade in the Vessel Operating Expense Relationship.

(ii) With respect to any significant deductions, the reserve shall be proportionately reduced as required by subparagraph (2)(ii) of this paragraph.

(iii) When any of the amounts required herein are different from those reported in the annual financial statements FMC-63 or FMC-64 or from those reported for Federal income tax purposes, the differences shall be set forth and fully explained.

(4) *Working Capital (Schedule IV)*. Working Capital shall be included on the Average Voyage Expense basis computed as follows:

(i) Average Voyage Expense shall be determined on the basis of the actual expenses of operating and maintaining the vessels employed in The Service (excluding lay-up expenses) for a period represented by the average length of time of all round voyages (excluding lay-up periods) terminated during the period on which any cargo was carried in The Trade. The expense of operating and maintaining the vessels employed in The Service shall include: (a) administrative and general expense (accounts 900-955 less accounts 670 and 895), allocated to The Service in the relationship that vessel operating expense of The Service bears to Vessel Operating Expense of all services, and (b) total vessel operating expense—terminated voyages (accounts 701-799 inclusive). For this purpose if the average voyage, as determined above, is of less than 90 days' duration, the expense of hull and machinery and P & I insurance (accounts 755 and 757, respectively) shall be determined to be that for 90 days: *Provided*, That such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the period.

(ii) The determination shall be made in the following manner:

First, by dividing the sum of such expenses for the period involved applicable to the vessels in The Service by the aggregate number of days consumed in all voyages of such vessels in The Service terminating during such period;

Second, by multiplying the quotient thus obtained by the number of days (excluding lay-up days) in the average voyage in The Service; and

Third, by multiplying the resulting product by the quotient of the total number of days (excluding lay-up days) consumed in voyages of vessels in The Service terminating during the period divided by the number of calendar days within the period.

(iii) Where vessel operating expense is allocated as provided in paragraph (c)(2) of this section, working capital (Average Voyage Expense) shall be computed on the basis of vessel operating expense of The Service and then allocated to The Trade in the relationship that vessel operating expense of The Trade bears to vessel operating expense of The Service. This schedule is not required of those carriers who annually file FMC-63 with the Federal Maritime Commission.

(5) *Working Capital (Schedule IV (A)).* Working capital for carriers who annually file FMC-63 with the Federal Maritime Commission shall be equal to one-twelfth of the expenses of the carrier during a 12-month period (one-sixth of the expenses of the carrier during a 6-month period), computed as follows: Add together the carrier's expenses during the period for vessel operating expense, administrative and general expense, other shipping operations, and inactive vessel expense, each as allocated to The Trade and shown respectively on Schedules VI(A), VII(A), VIII(A), and IX, and divide the total by 12, or 6, as may be appropriate.

(6) *Other assets.* Any other assets claimed by the carrier as components of its Rate Base shall be set forth separately in a schedule and related to amounts shown in the annual financial statements FMC-63 or FMC-64. The basis of allocation to The Trade shall be fully explained and supported by computations of percentages employed.

(7) *Property and Equipment of Related Companies.* Exhibit A provides for the reporting of property and equipment of Related Companies used in The Trade. Where such assets owned by Related Companies are used in The Trade, the profits of such Related Companies from such

use shall be included in the Income Account, and an appropriate allocation of the depreciated cost of such assets as reflected on the books of such Related Companies may be included in the Rate Base. The basis of allocating such net depreciated cost to The Trade shall be set forth and fully explained in a schedule similar to Schedule III.

(c) *Income Account (Exhibit B)*—(1) *Operating Revenue (Schedule V)*. (i) Revenue allocated to The Trade shall include only revenue earned from the common carriage of cargo in the Domestic Offshore Trade on voyages terminated during the period. Revenue tons and revenue amounts shall be reported separately for each of the 15 commodities producing the highest revenues in The Trade.

(ii) When any of the amounts reported in the Income Account are based on amounts which are different from those reported in the annual financial statements, the differences shall be set forth and fully explained.

(2) *Vessel Operating Expense (Schedule VI)*. A Vessel Operating Expense summary of Voyages terminated during the period, including all Voyages in which any cargo was carried in The Service, shall be submitted setting forth allocations to The Trade on the following bases:

(i) Vessel Expense shall be allocated, where an allocation is necessary, to The Trade in the Revenue Ton-Mile Relationship. This procedure will be required for all Voyages in The Service. Should any of the elements of vessel expense be directly allocable to specific cargo, such direct allocations shall be made and explained.

(ii) Port, cargo, freight, brokerage, and other voyage expenses, separately by ports at which incurred, shall be allocated between The Trade and Other Cargo directly to the extent practicable, or otherwise on the basis of Revenue Tons loaded and discharged at such ports.

(iii) Passenger revenue less passenger brokerage and other voyage revenue earned in The Service shall be deducted from vessel operating expense and distributed

between The Trade and Other Cargo in the Revenue Ton-Mile Relationship.

This schedule is not required of those carriers who annually file FMC-63 with the Federal Maritime Commission.

(3) *Vessel Operating Expense (Schedule VI(A))*. This schedule shall be submitted by carriers who annually file FMC-63 with the Federal Maritime Commission. It is designed to summarize operating results and to provide for allocations to The Trade where necessary because of the simultaneous carriage of Other Cargo. The principles of allocation are the same as those required by subparagraph (2) of this paragraph.

(4) *Administrative and General Expense (Schedules VII and VII(A))*. Administrative and general expense less agency fees, commissions, and brokerage earned shall be allocated to The Trade in the Vessel Operating Expense Relationship. Direct allocations may be made, where practicable, particularly with respect to advertising expense related to the operation of passenger and combination vessels. Any direct allocation shall be explained in detail and set forth in an appropriate schedule.

(5) *Other Shipping Operations (Schedule VIII)*. Terminal, Cargo Handling, Tug and Lighter, and Other Shipping Operations shall be allocated to The Trade on a tonnage or volume basis as a measure of use and shall be made separately by ports at which incurred. The methods used shall be explained and fully supported. If interdepartmental credits for services and facilities are used by the carrier, such credits shall be allocated so as to offset the related contra charges included in the voyage accounts. Revenues earned from services performed for others, unrelated to The Trade, and the related costs and expenses shall not be allocated to The Trade. This schedule is not required of those carriers who annually file FMC-63 with the Federal Maritime Commission.

(6) *Other Shipping Operations (Schedule VIII(A)).*
 (i) This schedule shall be submitted by carriers who annually file FMC-63 with the Federal Maritime Commission. Items related to shipping, classified on Schedule VIII(A) as other shipping operations, shall be allocated to The Trade on a tonnage or volume basis as a measure of use and shall be made separately by ports at which incurred. The methods used shall be explained and fully supported.

(ii) Interdepartmental debits and credits shall be offset as explained in subparagraph (5).

(iii) Revenues earned from services performed for others, unrelated to The Trade, and related costs and expenses shall not be allocated to The Trade.

(7) *Inactive Vessel Expense (Schedule IX).* Inactive vessel expense shall, in general, be allocated by vessel on the same basis as the investment in such vessel is included in the Rate Base. However, when a vessel is definitely assigned to The Service, any inactive vessel expense for that vessel may be allocated to The Service. If such a vessel be temporarily chartered out to minimize lay-up expense, no lay-up expense incurred before or after such charter period need be allocated to the charter. Inactive vessel expense applicable to vessels not used in The Service or withdrawn from The Service shall be excluded, paragraph (b) (1)(i)(b) of this section.

(8) *Depreciation and Amortization (Schedule X).* Depreciation and amortization of assets included in the Rate Base shall be allocated on the same bases as the specific assets.

(9) *Construction—Differential Subsidy Refund (Schedule XI).* Construction-differential subsidy refunds paid or payable to the Marine Administration in connection with vessels employed on a part-time basis in The Service and applicable to the period for which a report is being made, calculated in accordance with the requirements of section

506 of the Merchant Marine Act, 1938, as amended, shall be taken into account. The construction-differential subsidy refund attributable to operations in The Service shall be allocated to The Trade in the relationship that the Revenue Ton-Miles of cargo carried in The Trade bear to the total Revenue Ton-Miles of that cargo the revenue from which was used to determine the amount of the refund. Whenever expenses applicable to The Trade are increased due to construction-differential subsidy refunds, details of calculations with respect thereto must be reported on Schedule XI.

(10) *Other.* (i) Any other elements of income or expense wholly or partially applicable to The Trade shall be fully explained and supported by a schedule showing details of allocation and reconciliation with amounts shown in the annual financial statements FMC-63 or FMC-64.

(ii) Operating-differential subsidy refunds under section 605(a) of the Merchant Marine Act, 1936, as amended, shall not be allocated to The Trade.

(11) *Federal income tax.* Federal income taxes allocated to The Trade shall be set forth together with the details of the computation thereof.

(12) *Profits of related companies.* Net income, after Federal income taxes earned by Related Companies of the carrier in performing services for the carrier in The Trade shall be included in an appropriate manner. The methods employed in determining such net income shall be fully explained and supported by a schedule.

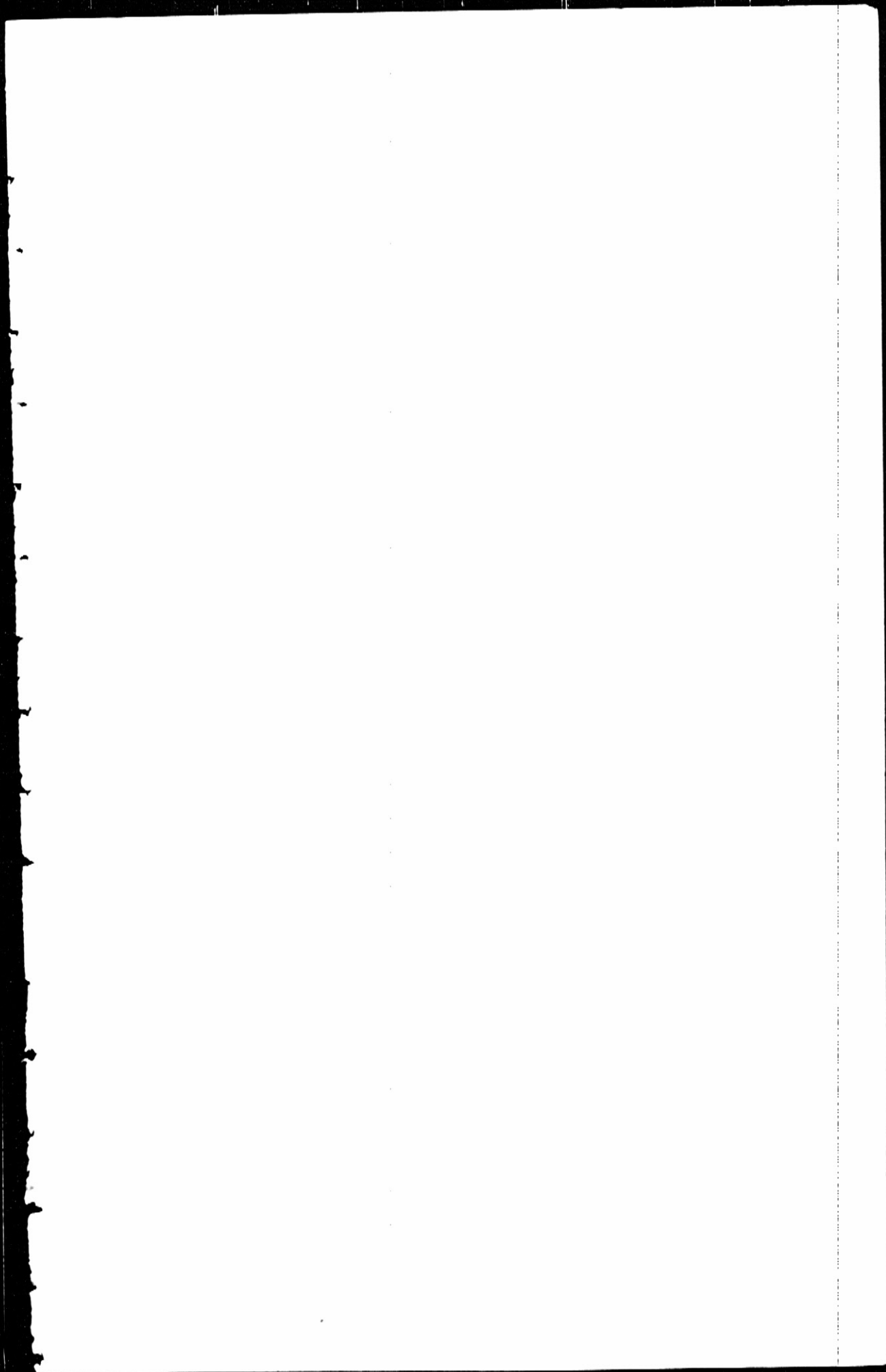
These rules shall become effective 30 days from date of publication in the FEDERAL REGISTER, pursuant to section 4(c) of the Administrative Procedure Act (5 U.S.C. 1003).

By order of the Commission, June 2, 1964.

THOMAS LISI,

Secretary.

[F.R. Doc. 64-5992; Filed, June 16, 1964; 8:50 a.m.]



JOINT APPENDIX.

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Petition for Review.

UNITED STATES COURT OF APPEALS,
FOR THE DISTRICT OF COLUMBIA.

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

against

UNITED STATES OF AMERICA and
FEDERAL MARITIME COMMISSION,
Respondents.

Docket No. 18667

This is a petition for review of the final order of the Federal Maritime Commission (hereinafter referred to as "the Commission") entered on April 7, 1964 and served on Alcoa Steamship Company, Inc. by mail on April 8, 1964 purportedly issued pursuant to Section 21 of the Shipping Act, 1916. The order is reviewable under 5 U. S. C. Section 1032. Venue is in this Court under 5 U. S. C. Section 1033. A copy of this order is attached to this petition as "Exhibit A".

NATURE OF THE PROCEEDING AS TO WHICH REVIEW IS SOUGHT.

1. The Commission pursuant to its General Order No. 5 issued under the authority contained in Section 21 of the Shipping Act, 1916, requires common carriers by water engaged in the domestic off-shore trades to file certain financial reports. Pursuant to this order Alcoa Steamship Company, Inc. filed a financial report, form F.M.C.-64, covering the calendar year 1962. The Section 21 Order which has been served on the Alcoa Steamship Company, Inc. has as its purpose, according to the terms of the

Petition for Review.

order, the conduct of an audit of the books and records of Alcoa "in order to evaluate and verify" said report. The order issued by the Commission would require the production of practically all of the books, records, reports and memoranda of the Alcoa Steamship Company, Inc. relating to the calendar year 1962.

2. On October 23, 1963 there appeared in the Federal Register (27 F. R. 11,318) a notice of proposed rule making instituted by the Commission proposing the issuance of "rules which will require vessel operating common carriers by water in the domestic off-shore trades to file with the Commission semi-annual statements setting forth rate bases and income accounts for each regulated trade in which operations are performed". In Section 5 of said proposed rules audits of carriers' books and records were to be specifically provided for as follows:

"Sec. 5. Access to working papers. All working papers (irrespective of by whom prepared) in support of all exhibits and schedules submitted, as well as the books and records of the carrier, shall be made available upon request for examination by auditors representing the Federal Maritime Commission, and said auditors shall be permitted to make copies of such records to the extent they deem necessary."

3. It was provided in said notice of proposed rule making that interested parties could submit written comments and arguments concerning such proposed rules. Alcoa Steamship Company, Inc. submitted such comments and arguments contesting among other things the Commission's authority to audit their books and records absent a provision in the Shipping Act, 1916, as amended (46 U. S. C. 801 *et seq.*) or the Intercoastal Shipping Act of 1933 (46 U. S. C. 843 *et seq.*) authorizing such audits.

Petition for Review.

4. While the Commission's said proposed rules were still under consideration by the Commission, including its specific provision providing for the audit of the carriers' books and records, the Commission by letter dated December 17, 1963 requested that petitioner's books and records for 1962 be made available for an audit in connection with the report filed by Alcoa Steamship Company, Inc. pursuant to General Order No. 5 for the calendar year 1962. Petitioner by letter dated February 4, 1964 declined to make such books and records available for audit stating as follows:

"It is our view that we should not be called upon to consent to an audit of our corporate records at this time while the Commission's Docket 1152 is still pending. In Docket 1152 we have raised the question of the statutory authority for the Commission to make such audits and for us to consent to an audit at this time would be contrary to the position we have taken in the comments we have filed with the Commission in that docket."

5. The Commission nevertheless thereupon issued its order of April 7, 1964.

6. The Commission's order, of which review is sought, states that it has been issued pursuant to the authority granted to the Federal Maritime Commission under Section 21 of the Shipping Act, 1916, 46 U. S. C. Section 820.

7. This is a final order within the meaning of 5 U. S. C. Sections 1009(c) and 1032.

8. Petitioner is aggrieved by and petitions this Court for review of the Commission's order requiring it to submit to an audit of practically all of its books and records for the year 1962.

Petition for Review.

GROUND'S UPON WHICH RELIEF IS SOUGHT.

The Commission in issuing its order erred in the following significant respects:

1. Under Section 21 of the Shipping Act, 1916, pursuant to which the Commission purports to act, the Commission does not have the authority to audit the books and records of Alcoa Steamship Company, Inc. as here being sought.

2. As to petitioner, this order is a form of rule making which fails to conform to the requirements of the Administrative Procedure Act, 5 U. S. C. Section 1003.

3. The Commission's order goes beyond what is reasonably relevant to the Commission's statutory authority and is an undue burden in violation of petitioner's rights under the Fourth Amendment of the United States Constitution.

4. In the alternative, the Commission having elected to proceed under the rule making procedure specified in the Administrative Procedure Act by proposing to propound rules giving it the power to have the books and records of the carriers audited, it is precluded in the advance of propounding of any such rules from issuing said order.

THE RELIEF PRAYED.

Petitioner prays that this Court:

1. Find that the Commission erred in the foregoing respects and vacate the Commission's order issued April 7, 1964.

Petition for Review.

2. Grant such other and further relief as the Court may deem proper.

Dated: June 2, 1964.

Respectfully submitted,

s/ ELMER C. MADDY
ELMER C. MADDY
CLEMENT C. RINEHART
RUSSELL T. WEIL,
120 Broadway,
New York 5, N. Y.
and
The Farragut Building,
900 Seventeenth Street, N. W.,
Washington 6, D. C.,
Attorneys for Alcoa Steamship
Company, Inc.

KIRLIN, CAMPBELL & KEATING
120 Broadway,
New York 5, N. Y.,
and
The Farragut Building,
900 Seventeenth Street, N.W.,
Washington 6, D. C.,
Of Counsel.

[Exhibit A to this Petition appears at J. A. 12]

JA 6

Letter dated May 29, 1963 from O. A. Swenson.

May 29, 1963

MR. JAMES L. WALLACE
Director, Bureau of Financial Analysis
Federal Maritime Commission
Washington 25, D. C.

Dear Sir:

Please accept our apologies for not advising you sooner of our reason for not forwarding to you copies of a report reflecting our financial position as at December 31, 1962, and operating results for the year ended that date.

Due to the extraordinary amount of work encountered in this office during the first quarter of the year and a reduced staff to accomplish same, it was impossible for us to complete preparation of this voluminous detailed report within the prescribed time. However, we are plugging away at it, and if you will be good enough to grant us until the 15th of June we feel certain the report will be completed.

Once again our apologies for not advising you sooner of our difficulties.

Very truly yours,

ALCOA STEAMSHIP COMPANY, INC.

O. A. SWENSON
Manager, Accounting

OAS:L

cc: Mr. W. H. Trauth, Washington Office

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**Letter dated June 13, 1963 from O. A. Swenson
to James L. Wallace.**

June 13, 1963

MR. JAMES L. WALLACE
Director, Bureau of Financial Analysis
Federal Maritime Commission
Washington 25, D. C.

Dear Sir:

Thank you for your letter of June 4th granting us an extension to June 15, 1963 for filing Federal Maritime Commission Form FMC-64. We are pleased to enclose this form in duplicate.

Prior to filing next year's report, we would appreciate it if we could discuss some of our problems in preparing this report and perhaps be allowed to submit a more simple version.

Very truly yours,

ALCOA STEAMSHIP COMPANY, INC.

O. A. SWENSON
Manager, Accounting

OAS:L
Encls.

**Letter dated December 17, 1963 from Timothy J. May
to Alcoa Steamship Company, Inc.**

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C. 20573

December 17, 1963

**ALCOA STEAMSHIP COMPANY, INC.
17 Battery Place
New York 4, New York**

**Attention: O. A. SWENSON, Assistant Secretary,
Fiscal and Accounting**

Gentlemen:

The Director of the Bureau of Financial Analysis has informed me that one of his field auditors, Mr. Harry Chuback, has contacted your company for the purposes of advising of his intent to audit the accounts, books, and records of your company and for selecting a mutually agreeable date for the commencement of such audit.

It is also my understanding that prior to the commencement of such audit you have requested that you be informed of the area and scope of the audit and of the time necessary to achieve its accomplishment.

In compliance with your request you are advised that the area of the audit is to be corporate wide, i.e., it will not be limited to a single activity or to a selected group of activities. The scope of the audit will be limited, however, to an examination of your financial position as at December 31, 1962, and such tests of transactions as are deemed necessary (rather than a detailed examination of all transactions) that occurred during the calendar year 1962.

*Letter dated December 17, 1963 from Timothy J. May
to Alcoa Steamship Company, Inc.*

The purpose of the audit is to verify the accuracy of the financial report which you submitted on Form FMC-64 for the calendar year 1962, and to determine whether or not the report was compiled in accordance with the instructions embodied in the Form. The length of time required by the audit cannot accurately be predetermined. However, it can be stated that Mr. Chuback, who it is expected will perform your audit, has already completed several other similar audits in the New York area and has been able to accomplish their individual completion on the average in approximately three weeks. It should be noted, however, that this time program was realized primarily because of the complete co-operation of these companies, as well as that of their certified public accountants in making available their working papers. In fact the availability of the public accountants' work papers has in major part expedited the completion of these audits.

Inasmuch as the Commission is of the opinion that regular periodic audits of the accounts and records of common carriers by water operating in the various domestic offshore trades are essential to its purposes in discharging its regulatory responsibilities, your co-operation in the matter of this audit is sincerely requested.

It will be appreciated if you will promptly advise me of an early date on which the audit under reference herein can be commenced.

Sincerely yours,

TIMOTHY J. MAY
Managing Director

**Letter dated February 4, 1964 from O. A. Swenson
to Timothy J. May.**

February 4, 1964

Mr. TIMOTHY J. MAY
Managing Director
Federal Maritime Commission
1321 H Street, N. W.
Washington 25, D. C.

Re: Commission Audit

Dear Mr. May:

We refer to your letter dated December 17, 1963 and the subsequent conversations of Mr. William A. Trauth of our Washington office with Mr. Wallace, Director of the Bureau of Financial Analysis, concerning an audit of our accounts, books and records based upon the financial report for the calendar year 1962 submitted on Form FMC-64.

It is our view that we should not be called upon to consent to an audit of our corporate records at this time while the Commission's Docket 1152 is still pending. In Docket 1152 we have raised the question of the statutory authority for the Commission to make such audits and for us to consent to an audit at this time would be contrary to the position we have taken in the comments we have filed with the Commission in that docket. For your information, we are enclosing a copy of our comments filed in that proceeding with this letter. In the next to the last paragraph of your letter you advise that "the Commission is of the opinion that regular periodic audits of the accounts and records of common carriers by water operating in the various domestic off-shore trades are essential to its purposes in discharging its regulatory responsibilities". It appears to us, however, that there is as yet no Commission order setting forth such a Commission policy if such is the case. As we understand it, this is one of the very matters

*Letter dated February 4, 1964 from O. A. Swenson to
Timothy J. May.*

which is the subject of the Commission's proposed rules in Docket 1152 which has not yet been passed upon by the Commission.

In addition, as Mr. Trauth pointed out to Mr. Wallace, in connection with the proceedings Alcoa Steamship Company has been involved in in Dockets 1066 and 1068 relating to a general increase in rates in the Puerto Rican Trade, its accounts, books and records have been extensively audited by the Bureau of Financial Analysis in accordance with the procedures provided for by Examiner Morgan in that proceeding. The Bureau of Financial Analysis should have already available to it the necessary data to establish the correctness of the figures set forth in the report filed with the Commission by Alcoa Steamship Company for the year 1962 as a result of such audit.

For these reasons we respectfully decline to have our books audited as you request.

Very truly yours,

ALCOA STEAMSHIP COMPANY, INC.
O. A. SWENSON
Secretary

:L

cc: Mr. JAMES L. WALLACE, Director
Bureau of Financial Analysis
Federal Maritime Commission
1321 H Street, N. W.
Washington 25, D. C.

F. M. C. Section 21 Order dated April 7, 1964.

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

(SERVED
April 27, 1964)
(FEDERAL MARITIME
COMMISSION)

**SECTION 21 ORDER
PRODUCTION OF BOOKS AND RECORDS OF
ALCOA STEAMSHIP COMPANY**

Under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, the Federal Maritime Commission has certain responsibilities relative to rates charged in the foreign commerce of the United States and in the domestic offshore commerce. The Commission must determine that rates are just and reasonable, and in the performance of this duty the Commission requires that common carriers by water supply it with certain data and reports involving operations which are subject to the Commission's jurisdiction. Section 21 of the Shipping Act, 1916, provides that the Commission may require any common carrier by water to "file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act."

In the implementation of its statutory responsibilities, the Commission on January 24, 1962, adopted its General Order 5 which prescribes the form for required financial reports and the time limit within which such reports are to be filed. Pursuant to this General Order, Alcoa Steamship Company filed FMC-64 (a report required by this Order) for the calendar year 1962.

In order to evaluate and verify the reports filed pursuant to General Order 5, the Commission's staff must conduct audits of the books and records of the reporting carriers and other persons subject to the Act. Such audits

F. M. C. Section 21 Order dated April 7, 1964.

are absolutely necessary to the discharge of the Commission's responsibilities, and if they were not undertaken the reports filed with the Commission would not be subject to verification, and therefore of uncertain value to the Commission. A request to audit certain books and records was made of Alcoa Steamship Company, and this request was refused.

NOW, THEREFORE, Pursuant to the authority vested in it by Section 21 of the Shipping Act, 1916, the Commission hereby orders Alcoa Steamship Company to produce at the Commission's offices in Washington, D. C., or such other place as may be satisfactory to the Director of the Bureau of Financial Analysis of the Commission, on or before the close of business April 27, 1964, the following described books, records, reports, and memoranda, relating to the calendar year 1962:

1. General ledger, including private ledger, if any.
2. All books of original entry.
3. All voyage account summaries, including all supporting data.
4. Journal vouchers and supporting data.
5. Cash vouchers and supporting data.
6. All bank statements and cancelled checks.
7. Administrative and general office payrolls.
8. Vessel payrolls.
9. Cargo manifests and bills of lading.
10. Minutes of Directors' meetings.
11. Data as to home office allocation of overhead.
12. Public accountant audit working papers.

F. M. C. Section 21 Order dated April 24, 1964.

13. Federal income tax returns.
14. State income and franchise tax returns.
15. Copies of all agreements in effect during calendar year 1962, including but not limited to the carriage of cargo owned by related companies, stevedoring, terminal, and other operating agreements, profit sharing and bonus agreements.
16. All management and internal reports, including those to parent company.

By the Commission, April 7, 1964.

THOMAS LISI,
Secretary.

F. M. C. Section 21 Order dated April 24, 1964.

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

SECTION 21 ORDER
PRODUCTION OF BOOKS AND RECORDS OF
ALCOA STEAMSHIP COMPANY

(SERVED
April 27, 1964)
(FEDERAL MARITIME
COMMISSION)

EXTENSION OF TIME FOR COMPLIANCE
WITH SECTION 21 ORDER

The time for compliance by Alcoa Steamship Company with Section 21 Order served April 8, 1964, in this matter is hereby postponed to the close of business May 27, 1964.

By the Commission, April 24, 1964.

THOMAS LISI
Secretary

**Letter dated May 8, 1964 from G. C. Halstead
to Admiral John Harllee.**

May 8, 1964

ADMIRAL JOHN HARLLEE
Chairman, Federal Maritime Commission
1321 H Street N.W.
Washington, D. C.

Dear Admiral Harllee:

First off, let me thank you for the kind reception which you and Mr. Schmeltzer extended to Mr. Trauth and myself during the occasion of our visit to your office on April twenty-third.

For the record, I am quoting below the exchange of telegrams in relation to our request for an extension of time in the answering of your Section 21 order:

“April 24, 1964

ADMIRAL JOHN HARLEE
CHAIRMAN FEDERAL MARITIME COMMISSION
1321 H STREET N W
WASHINGTON D C

WE CONFIRM OUR REQUEST AT THE MEETING WITH YOU YESTERDAY TO EXTEND FROM APRIL 27 TO AND INCLUDING MAY 27 ALCOAS TIME TO COMPLY WITH THE COMMISSIONS SECTION 21 ORDER DATED APRIL 8 STOP THE PURPOSE OF THE EXTENSION IS TO ENABLE FURTHER MEETINGS WITH APPROPRIATE COMMISSION REPRESENTATIVES TO SEE WHETHER WE CAN AGREE ON AN ARRANGEMENT FOR FURNISHING ANY INFORMATION TO WHICH THE COMMISSION IS ENTITLED IN RESPECT OF THE MATTERS MENTIONED IN THE COMMISSIONS ORDER STOP NATURALLY ALCOA RESERVES ALL ITS RIGHTS AND REMEDIES IF A MUTUALLY SATISFACTORY ARRANGEMENT IS NOT REACHED

G C HALSTEAD PRESIDENT
ALCOA STEAMSHIP CO INC”

*Letter dated May 8, 1964 from G. C. Halstead to
Admiral John Harlee.*

"April 24, 1964

ALCOA STEAMSHIP CO. ATTN GEORGE C
HALSTEAD PRES
FEDERAL MARITIME COMMISSION HAS GRANTED
YOUR REQUEST FOR EXTENSION OF THIRTY DAYS
FOR COMPLIANCE WITH SECTION 21 ORDER. NEW
DUE DATE IS MAY 27 1964

THOMAS LISI SECY
FEDERAL MARITIME COMM"

We also acknowledge receipt on April 28, 1964 of the Commission's official enlargement of the original Section 21 order, extending the compliance date until the close of business on May 27, 1964.

As explained to you in your office, we were extremely concerned with the manner in which this Section 21 order was issued, as we interpreted the advance leak to the press, the shortness of time for compliance, and the oppressively broad scope of the order, as an act particularly unwarranted under the circumstances. As we pointed out in our letter to Mr. Timothy J. May dated February 9, 1964, it is our view that we should not be called upon to consent to an audit while the Commission's Docket 1152 is still pending. Nevertheless, in the interest of continuing amicable relations we would be prepared to agree to an audit of Alcoa Steamship Company in relation to your rate regulation responsibility over our operations as a common carrier, with the expectation that a continuing arrangement similar to that mentioned below is agreeable.

We understand that the audit stems from our filing of form FMC-64 for the calendar year 1962. The Alcoa Steamship Company has been filing FMC-64 and predecessor forms for over fifteen years and has included in these reports information concerning common carriage, private carriage and contract carriage. The inclusion of information on private and contract carriage has been done in the interests of cooperation in accounting and statistical areas

*Letter dated May 8, 1964 from G. C. Halstead to
Admiral John Harllee.*

counting heavily on the responsibility of the Federal Maritime Commission to keep this confidential, with full knowledge that the Maritime Commission's regulatory authority over rates does not extend into these areas. The filings concerning private and contract carriage are broad in nature but, however, are sufficient to indicate the general activity therein. Detailed information in this area is of a highly confidential nature, and disclosure of the same could have serious effect on the economics of the Alcoa Steamship Company.

The books of the Alcoa Steamship Company are maintained in such a fashion as to allow for the preparation of statements on common carrier activities as opposed to other activities. In the area of common carriage, i.e., from the time that ships are placed on berth for cargo as advertised common carriers until such time as they enter private or contract carriage, we are prepared to make supporting material available. We realize that common carriage accounting contains joint expenses involving private and contract carriage, and if necessary we are prepared to disclose statistical and expense information in the private and contract carriage area in the proof of prorations.

For the purpose of the audit and the production of the books and records as requested in the Section 21 order, we wish to advise you that certain of the requested records contain substantial information necessary for the audit of our common carrier activities. Appropriate part of such records will be produced in the following categories:

1. General ledger, including private ledger, if any.
2. All books of original entry.
3. All voyage account summaries, including all supporting data.
4. Journal vouchers and supporting data.
5. Cash vouchers and supporting data.

*Letter dated May 8, 1964 from G. C. Halstead to
Admiral John Harllee.*

6. All bank statements and cancelled checks.
7. Administrative and general office payrolls.
8. Vessel payrolls.
9. Cargo manifests and bills of lading.

The other records requested contain minimal information pertaining to our common carrier activities, and therefore disclosure of information contained therein will be supplied only when it has been proven that the same information is not already in the records produced and that the information requested pertains strictly to our common carrier activities. These records would include the following:

10. Minutes of Directors' meetings.
11. Data as to home office allocation of overhead.
12. Public accountant audit working papers.
13. Federal income tax returns.
14. State income and franchise tax returns.
15. Copies of all agreements in effect during calendar year 1962, including but not limited to the carriage of cargo owned by related companies, stevedoring, terminal, and other operating agreements, profit sharing and bonus agreements.
16. All management and internal reports, including those to parent company.

Alcoa Steamship Company, as do all other corporate enterprises, has a problem with the matter of internal confidentiality. Unwarranted disclosures in this field can undo forty years' work toward the establishment of an efficient and successful organization. The area covered by this internal confidentiality is small, and we are confident that

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*Letter dated May 8, 1964 from G. C. Halstead to
Admiral John Harllee.*

through the careful exposure of this information the proper audit can be made and at the same time our position protected.

At such time as you have had the opportunity to study the proposal contained in this letter, we will be prepared to discuss this matter further with you, if necessary.

Of course, the foregoing proposal is made on a without prejudice basis to Alcoa if a mutually satisfactory arrangement is not reached.

Very truly yours,

ALCOA STEAMSHIP COMPANY, INC.

G. C. HALSTEAD
President

GCH:L

bc: E. SCHMELTZER, Esq.
c/o The Roosevelt Hotel, New Orleans, La.

Messrs. W. H. TRAUTH
O. A. SWENSON
N. B. BEAM/W. L. HAMM
W. E. HINSHAW/F. C. RUMBAUGH
E. C. MADDY

F. M. C. Section 21 Order dated May 27, 1964.

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

(SERVED
May 28, 1964)
(FEDERAL MARITIME
COMMISSION)

**SECTION 21 ORDER
PRODUCTION OF BOOKS AND RECORDS OF
ALCOA STEAMSHIP COMPANY**

**EXTENSION OF TIME FOR COMPLIANCE
WITH SECTION 21 ORDER**

The time for compliance by Alcoa Steamship Company with Section 21 Order served April 8, 1964, in this matter is hereby postponed to the close of business June 4, 1964.

By the Commission, May 27, 1964.

THOMAS LISI,
Secretary

**United States Court of Appeals for the District of
Columbia Circuit Order dated July 22, 1964.**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,667

September Term, 1963

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

Before: BAZELON, Chief Judge, Fahy and Wright, Circuit
Judges.

Order.

This case came on for hearing on petitioner's application for stay and interlocutory injunction, and said application was argued by counsel, and counsel for respondent Federal Maritime Commission having informed the court that examination of the records called for by the Commission's order on review herein will be made by the Commission in a place convenient to petitioner, it is

ORDERED by the court that the aforesaid application be denied, provided that the Commission shall examine the aforesaid records in a place and manner convenient to petitioner.

Per Curiam.

D. C. B.
C. F.
J. W.

Dated: July 22, 1964.

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 11,86

AUG 27 1964

ALCOA STEAMSHIP COMPANY, INC.,

Respondent,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL MARITIME COMMISSION

William H. Orrick, Jr.
Assistant Attorney General

James L. Pimper
General Counsel

Gerald Radish
Attorney

Calvin H. Mayo, III
Attorney

Department of Justice

Federal Maritime Commission

August 21, 1964
Washington, D. C.

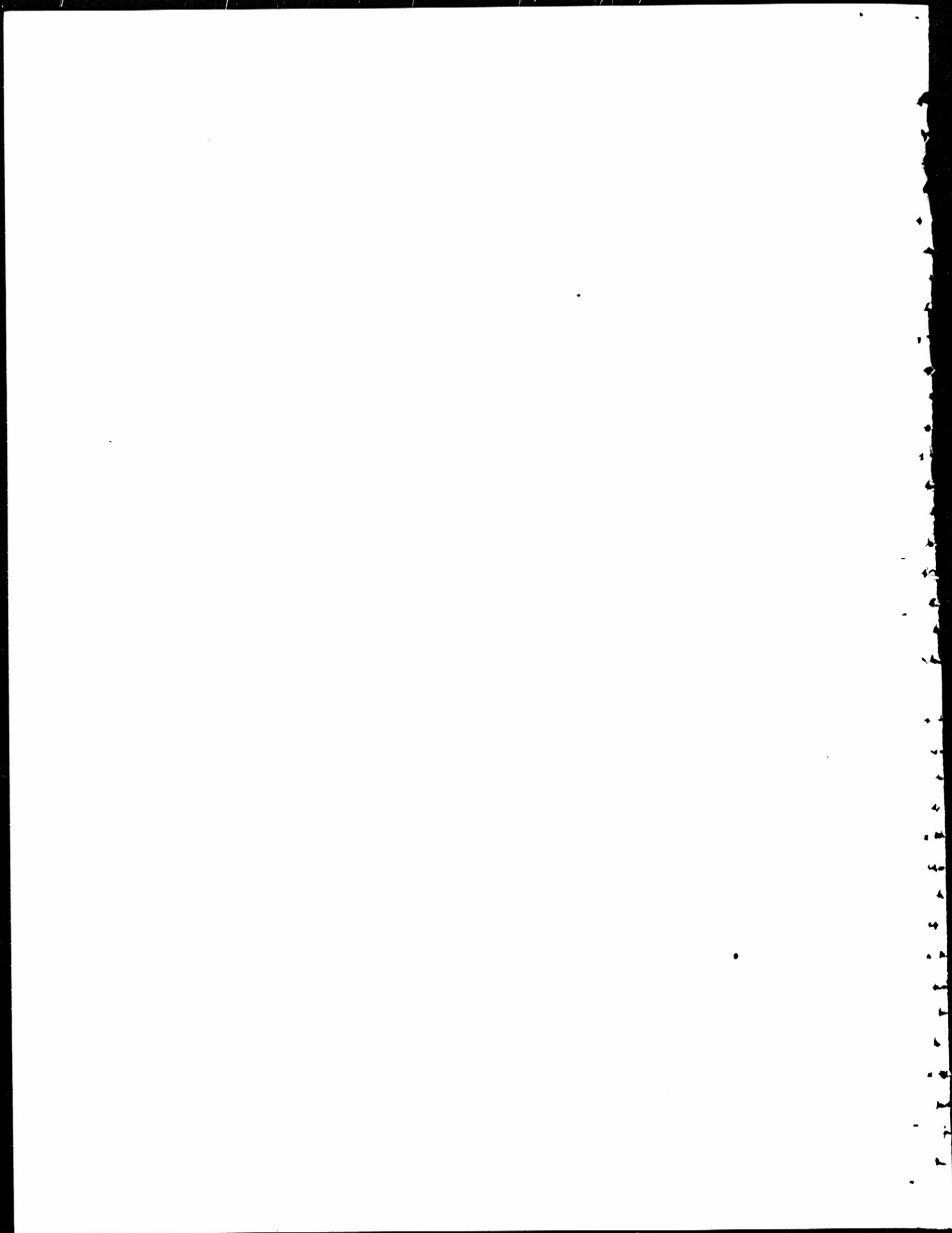


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COUNTERSTATEMENT OF CASE

The order of the Federal Maritime Commission under review herein was issued on April 7, 1964, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820). The order advises petitioner, a common carrier by water engaged in the domestic offshore commerce of the United States, over which the Commission has extensive regulatory jurisdiction pursuant to the Intercoastal Shipping Act, 1933, and the Shipping Act, 1916,^{1/} that in order to evaluate and verify a financial report filed by petitioner for the year 1962 (Form FMC-64), certain data specified in the order is required. The purpose of the order is to "verify" the report so filed, and the order was issued only after informal attempts to audit the books and records called for in the order had failed. On December 17, 1963, the Managing Director of the Commission advised the petitioner that the Commission's accountants desired to "verify the accuracy of the financial report which you submitted on Form FMC-64 for the calendar year 1962, and to determine whether or not the report was compiled in accordance with the instructions embodied in the Form" (J.A. 9). Petitioner declined to allow the Commission's accountants to conduct the audit as requested (J.A. 10-11). Thereupon the order now under review was issued.

Petitioner sought in this Court a temporary stay and interlocutory injunction against the effectiveness of the order. Memoranda were submitted both by petitioner and by respondents, oral argument was held before the

^{1/} See, e.g. sections 3 and 4 of the Intercoastal Shipping Act, 1933, (46 U.S.C. 845 and 845a) for the Commission's rate regulatory powers in the domestic offshore trades.

Court on July 16, 1964, and on July 22, 1964, the Court issued its order denying the injunctive relief which had been sought "provided that the Commission shall examine the aforesaid records in a place and manner convenient to petitioner" (J.A. 21). The Commission immediately sought to conduct the audit in compliance with the proviso of the Court's order, but petitioner again declined to acquiesce in the audit, which facts are shown by the affidavit of James L. Wallace and attachments thereto, included in this brief as Appendix C.

SUMMARY OF ARGUMENT

The order issued by the Federal Maritime Commission on April 7, 1964, here under review, was validly issued under section 21 of the Shipping Act, 1916, and it is a proper exercise of the Commission's power under that statutory section. The order clearly states the purpose for which it was issued, i.e., to verify a financial report filed by the petitioner.

There is involved in this proceeding no question of a conflict with a rulemaking proceeding or with rules issued by the Commission, because, as shown by the affidavit previously filed in this proceeding and attached to respondents' brief as Appendix B, the rulemaking proceeding and the rules issued pursuant thereto involve reports different from the one which the Commission now seeks to verify.

The order is not unduly burdensome to petitioner because the books and records may be produced at a place other than the Commission's offices in Washington, i.e., they may be examined at petitioner's offices in New York.

ARGUMENT

I. The Commission's Order Is A Valid Exercise Of Its Statutory Power.

Petitioner relies primarily on its contention that the Commission does not have authority under section 21 of the Shipping Act, 1916, to conduct an audit of petitioner's books and records. This argument seems to be premised on the theory that because the right to audit has been given other regulatory agencies specifically with reference to the term "audit," nowhere in the statutes the Commission administers does the word appear. The argument is fallacious, because whether or not the order is termed an audit or a production of documents, the order is squarely within the terms of section 21 of the Shipping Act, 1916, which provides:

Sec. 21. That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts or transactions appertaining to the business of such carrier or other person subject to the Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

Furthermore, an examination of the decisions of the Supreme Court, this Court, the Second Circuit, and the Ninth Circuit in the cases of Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937), Montship Lines, Ltd. v. Federal Maritime Board, 111 App. D.C. 160, 295 F.2d 147 (1961), Hellenic Lines, Ltd. v. Federal Maritime Board, 111 U.S. App. D.C. 151, 295 F.2d 138 (1961), Far East Conference, et al. v. Federal Maritime Commission, (D. C. Cir., August 20, 1964), Kerr Steamship Co., Inc. v. United States,

284 F.2d 61 (1960), and Pacific Westbound Conference v. United States and Federal Maritime Commission, 332 F.2d 49 (1964), supports respondents' position as to the validity of the order in question.

A mere reading of the challenged order (J.A. 12-14) demonstrates the sufficiency of its purpose. The order specifically states that:

In order to evaluate and verify the reports filed pursuant to General Order 5, the Commission's staff must conduct audits of the books and records of the reporting carriers and other persons subject to the Act. Such audits are absolutely necessary to the discharge of the Commission's responsibilities, and if they were not undertaken the reports filed with the Commission would not be subject to verification, and therefore of uncertain value to the Commission. (J.A. 12-13)

Moreover, petitioner's attempt to support its attack on this order with the Montship and Hellenic cases, supra, is utterly misplaced. In Montship this Court upset the order there involved because of an "absence of any indication whatsoever" as to the order's purpose, and in Hellenic the Court declared inadequate orders which merely cited the agency's general Shipping Act responsibilities. The order now being challenged contains an ample statement of purpose. Recently, in the Far East Conference case, supra, this Court said:

A principal argument of petitioners is based on the decisions of this court in the Montship case, and in Hellenic Lines, Ltd. v. Federal Maritime Board, 111 U.S. App. D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to the particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort

by the Commission to meet the defect pointed out in our Montship and Hellenic Lines decisions, and, like the Ninth Circuit in its recent decision in Pacific Westbound, we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. (Slip opinion, pages 9-10)

Petitioner's argument that the purpose of the order is so vague as to invalidate the order would seem to be an afterthought. Petitioner raised this argument for the first time in its reply memorandum in support of its request for an interlocutory injunction and now repeats the argument in its brief on the merits. No such error was alleged as a ground upon which relief was sought, as required by Rule 38(a) of the rules of this Court. The contention, respondents submit, is meritless, for again on its face the order is adequately sufficient to appraise petitioner what is required and for what purpose.

II. There Is Involved In This Proceeding No Question Of Rulemaking Or Whether The Commission Has Authority Under Its Rules To Conduct An Audit, Since The Order Is Squarely Within The Terms Of The Statutory Section Under Which It Was Issued, And Therefore Resort To Rules Is Unnecessary.

Petitioner repeats in its brief the identical contention made in its application for interlocutory injunction that the Commission had outstanding at the time it issued the order here under review a general rulemaking proceeding wherein the Commission was proposing a rule to allow audits. Respondents submitted as an attachment to "Respondents' Memorandum In Opposition to the Application For Interlocutory Injunction" the affidavit of James L. Wallace, Director of the Bureau of Financial Analysis of the Commission, which stated that the rulemaking proceeding was unrelated to the

order here under review, and that the reports which would be required by the rules adopted in that proceeding were substantially different from the report which the Commission is now seeking to verify by means of the instant order. For the convenience of the Court, this affidavit is reproduced as Appendix B to respondents' brief.

Subsequent to this Court's order denying the interlocutory injunction sought by petitioner, petitioner has filed an appeal challenging the final rules issued by the Commission in its Docket 1152, Reports of Rate Base and Income Account of Domestic Offshore Carriers (J.A. 20-38).^{2/} By this appeal, petitioner recognizes that there is no relation between the instant order and the rulemaking proceeding, as the rules involved in the second appeal provide for reports to be filed subsequent to 1964, and the order now under review seeks verification of a report filed for 1962. Nevertheless, the issue of the Commission's right to verify any report filed with it is at the heart of both appeals, and a prompt disposition of this case by the Court in favor of respondents will enable respondents to move with dispatch to dismiss the second appeal.

III. There Is Involved In This Proceeding No Issue Of Undue Burden Or Unreasonable Search And Seizure, As Orders Far More Comprehensive Than The One Under Review Have Been Upheld.

Petitioner again argues that the order constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution. This argument was put to rest in United States v. Morton Salt Co., 338 U.S. 632 (1950) where the Supreme Court said that:

2/ This appeal was docketed on August 1, 1964, as No. 18,818.

"it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. 632, at 652. Accord, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and Far East Conference v. Federal Maritime Commission, supra. The Commission's order clearly meets this test.

As was also said in Morton Salt:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has the power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analagous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. 338 U.S. 632, at 642-43.

In its order denying the application for interlocutory injunction, this Court put to rest petitioner's argument of undue burden by conditioning the denial on a proviso that the Commission "shall examine the aforesaid records in a place and manner convenient to petitioner." (J.A. 21). As shown by the affidavit attached to this brief as Appendix C, the Commission is now willing to do just this. In fact, the Commission has at all times demonstrated that it desires to cooperate with petitioner in this regard, in line with this Court's statement in the Far East Conference case that "We rely on the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying." (Slip opinion, p. 10)

Under its "undue burden" argument, petitioner raises the additional argument that petitioner "has no right to divulge" the information which the Commission's accountants will evidently encounter in their examination of the records of petitioner. In making this argument, based supposedly on the confidentiality of the information, petitioner entirely overlooks section 20 of the Shipping Act, 1916 (46 U.S.C. 819), which provides in part that:

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Petitioner's duty of confidentiality, then, is relieved by the statute in this instance, and its argument in this regard is meritless.

CONCLUSION

For the foregoing reasons, Respondents pray that the order of the Commission be affirmed, that the petition to review be dismissed, and that the Court grant enforcement of the Commission's order.

Respectfully submitted,

William H. Orrick, Jr.
Assistant Attorney General

James L. Pimper
General Counsel

Gerald Kadish
Attorney

Walter H. Mayo III
Attorney

Department of Justice

Federal Maritime Commission

Washington, D. C.
August 21, 1964

SECTION 20, SHIPPING ACT, 1916
46 U.S.C. 819

"That it shall be unlawful for any common carrier by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers."

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

No. 18,667

AFFIDAVIT OF JAMES L. WALLACE IN OPPOSITION
TO APPLICATION FOR STAY AND INTERLOCUTORY INJUNCTION

UNITED STATES OF AMERICA)
DISTRICT OF COLUMBIA) ss.
CITY OF WASHINGTON)

JAMES L. WALLACE, being first duly sworn, on oath, deposes and says:
That he is the Director of the Bureau of Financial Analysis of the Federal Maritime Commission, herein called "the Commission," that Alcoa Steamship Company, Inc., petitioner in the above captioned case, filed with the Commission on June 17, 1963, a financial report for the calendar year 1962, which report is known as "FMC-64"; that such report is a company-wide report which includes a balance sheet, income account, surplus account, and supporting schedules; that the Commission issued its Section 21 Order under review in the above-captioned case to obtain records, reports, and data so as to verify the accuracy of said report, which order was issued by the Commission upon the recommendation of the affiant after informal attempts to verify said report had

failed; that on October 23, 1963, the Commission published in the FEDERAL REGISTER a notice of proposed rulemaking concerning reports of rate base and income account by vessel operating common carriers in the domestic offshore trades, which reports would contain information as to rate base, income account and supporting schedules for the regulated trade only; that the Commission published final rules in the FEDERAL REGISTER on June 17, 1964, copy of which is attached to this affidavit; that the reports required by these rules are separate and distinct from the report "FMC-64" filed by petitioner; and that the order requiring the records, reports, and data of petitioner has no relation whatsoever to the rules issued by the Commission on June 17, 1964,

James L. Wallace

SUBSCRIBED and SWORN to before me, this 18th day of June, 1964,
in the City of Washington, District of Columbia.

Ruth May Burroughs
Notary Public
My commission expires:

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.)

No. 18,667

AFFIDAVIT OF JAMES L. WALLACE

UNITED STATES OF AMERICA)
DISTRICT OF COLUMBIA)
CITY OF WASHINGTON)

ss.

JAMES L. WALLACE, being first duly sworn, deposes and says:

That he is the Director of the Bureau of Financial Analysis of the Federal Maritime Commission, herein called "the Commission"; that on July 23, 1964, he addressed a letter to Alcoa Steamship Company, Inc., a copy of which letter is attached to this affidavit as "Attachment A"; that he requested in the letter that two members of the Commission's staff be permitted to make an examination of the documents required to be produced by the Commission's order here under review, in accord with the Court's order of July 22, 1964, that such examination be "in a place and manner convenient to petitioner"; that on August 6, 1964, he received a letter from Elmer C. Maddy, Esq., of Kirlin, Campbell, and Keating, Attorneys for Petitioner, a copy of which letter is attached to this

affidavit as "Attachment B", in which letter it was stated that "the right of the Commission to audit the books and records . . . has still to be determined . . . " and that Petitioner's attorneys could not therefore give their consent to an examination of the books and records.

James L. Wallace

SUBSCRIBED and SWORN to before me, this 21st day of August, 1964,
in the City of Washington, District of Columbia.

:

Ruth May Burroughs
Notary Public
My Commission expires May 31, 1967.

FEDERAL MARITIME COMMISSION
WASHINGTON 25, D.C.

IN REPLY REFER TO:
030

July 23, 1964

Alcoa Steamship Company, Inc.
Seventeen Battery Place
New York, New York 10004

Attention: Mr. O. A. Swenson

Re: Alcoa Steamship Company, Inc. v. Federal
Maritime Commission, No. 18,667 - D. C.
Circuit

Dear Sir:

Reference is made to the Court's order dated July 22, 1964, denying your application for stay and interlocutory injunction, and stating that the Commission "shall examine the records in a place and manner convenient to petitioner."

Pursuant to the terms of the order, Messrs. Finegan and Chuback of the Commission's staff will be prepared to commence an audit of the documents and records covered by the Commission's order on Wednesday, July 29, 1964, at 9 A.M. at your offices at 17 Battery Place, New York.

Please promptly advise if the foregoing is agreeable to you.

Sincerely yours,

(Sgd.) James L. Wallace

James L. Wallace
Director, Bureau of Financial Analysis

cc: Clerk, United States Court
of Appeals, District of
Columbia Circuit
Paul F. Mc Guire, Esq.
Russell T. Weil, Esq.
Kirlin, Campbell & Keating
Clement C. Rinehart, Esq.
Elmer Maddy, Esq.

"APPENDIX C"
Attachment B

71
72
WASHINGTON OFFICE
THE FARRAGUT BUILDING
900 SEVENTEENTH ST., N.W.
WASHINGTON 6, D.C.

RONALD A. CAPONE
RESIDENT PARTNER

KIRLIN, CAMPBELL & KEATING
ONE TWENTY BROADWAY
NEW YORK 5, N.Y.

OUR REF. NO. 68942

CLETUS KEATING
L. DE GROVE POTTER
VERNON S. JONES
H. MAURICE FRIDLUND
JAMES H. HERBERT
CLEMENT C. RINEHART
ARNOLD TULP
WILLIAM A. SHEEHAN
LOUIS J. GUSHANO
JOHN F. GERITY
EARL O. KULLMAN
JAMES B. MAGNOR
J. M. CUNNINGHAM
WALTER P. HICKEY
ELMER C. MADDY
JAMES J. HIGGINS
MATTHEW L. DANAHAR
THOMAS COYNE
EDWARD J. HEINE, JR.
MARSHALL P. KEATING
RICHARD H. BROWN, JR.
RICHARD H. SOMMER
PAUL F. MCGUIRE
ALEXANDER E. RUGANI
ROBERT P. HART
DANIEL J. DOUGHERTY

August 5, 1964

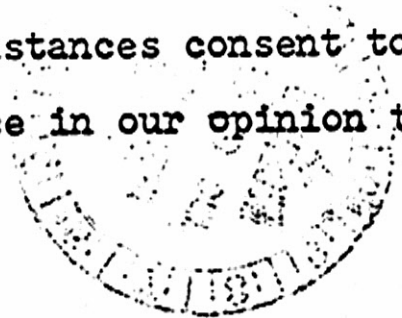
Mr. James L. Wallace
Director, Bureau of Financial Analysis
Federal Maritime Commission
Washington 25, D.C.

Re: Alcoa Steamship Company, Inc. v.
Federal Maritime Commission,
No. 18,667 - D.C. Circuit

Dear Mr. Wallace:

Your letter of July 23, 1964 advising that you were prepared to commence an audit of the documents and records covered by the Commission's Section 21 Order at Alcoa Steamship Company, Inc.'s offices has been turned over to us for a reply.

We wish to advise you that in view of the fact that the right of the Commission to audit the books and records of Alcoa Steamship Company, Inc. has still to be determined in the above-entitled proceeding, we cannot under the circumstances consent to the audit of such books and records since in our opinion the Commission is proceeding



to act improperly in seeking to do so.

For your information we have today written to Mr. Mayo of the Commission's Office of General Counsel suggesting an expedited scheduling of briefing in this case in an endeavor to obtain a speedy determination of the issues presented by Alcoa's Petition for Review of the Commission's Section 21 Order.

Very truly yours,

KIRLIN, CAMPBELL & KEATING

BY: *Elmer C. Maddy*

ECM:mlw

cc: Clerk

U.S. Court of Appeals
for the District of Columbia
Constitution Ave. & John
Marshall Place, N.W.
Washington, D.C.

*Copy sent to
Mr. Mayo
8-6-64 per
JW/mak.*



REPLY BRIEF FOR PETITIONER ALCOA AND
SUPPLEMENTAL JOINT APPENDIX.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 18,667.

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL
MARITIME COMMISSION ORDER.

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 21 1964

Nathan J. Paulson
CLERK

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and

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900 Seventeenth Street, N. W.,
Washington 6, D. C.,

Attorneys for Petitioner,
Alcoa Steamship Company, Inc.

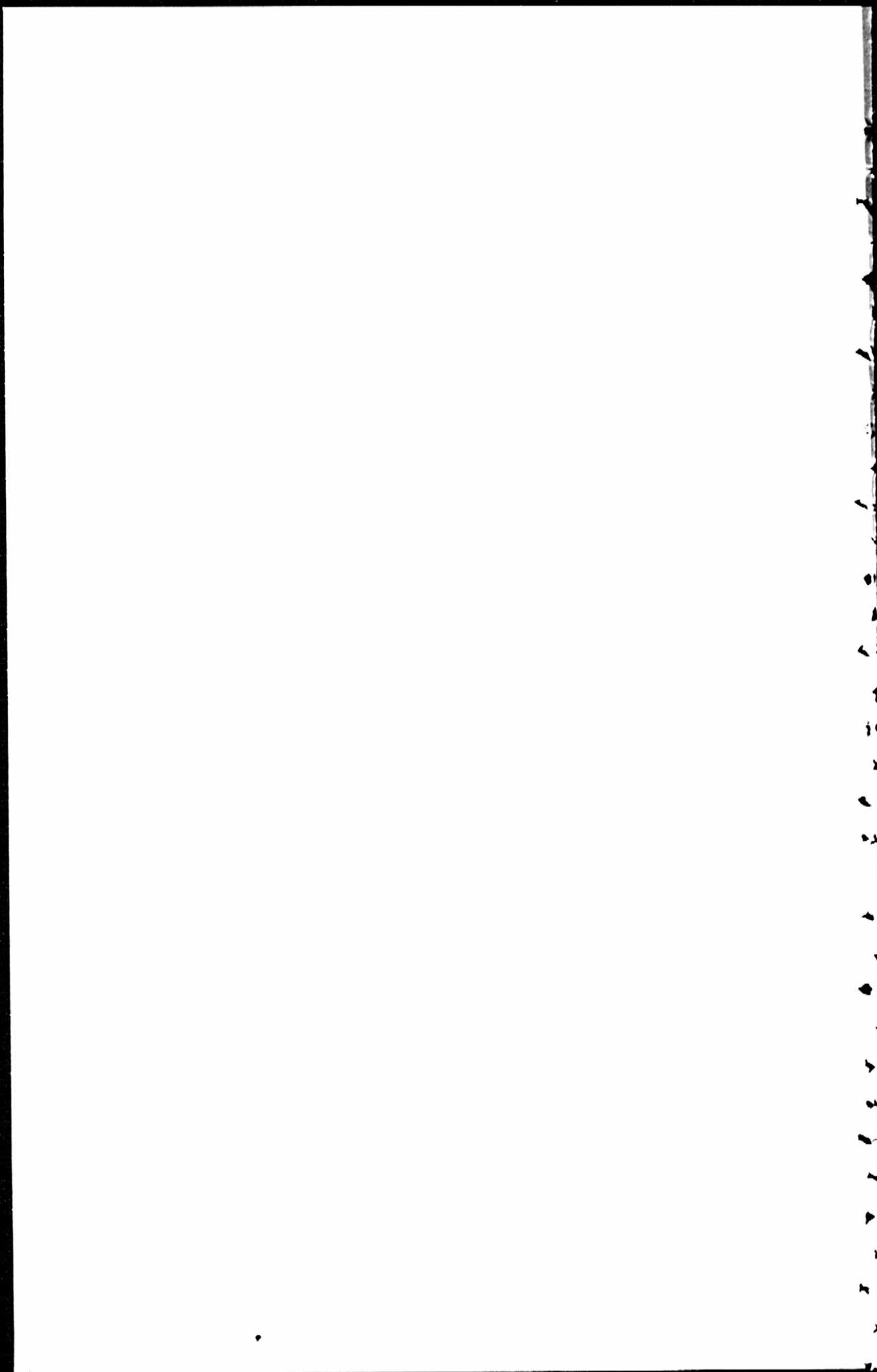


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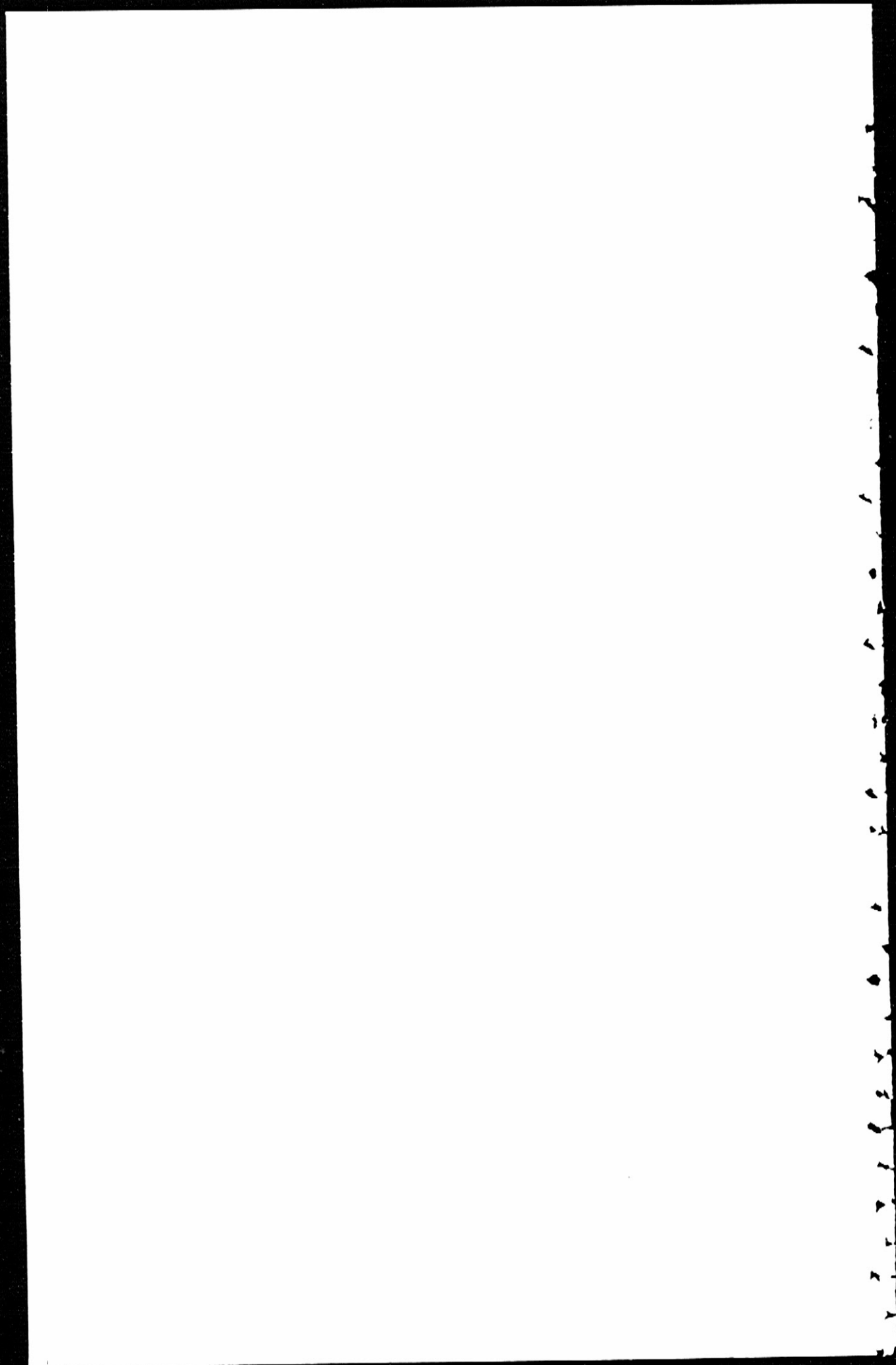
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IN THE
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FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF FEDERAL MARITIME
COMMISSION ORDER.

REPLY BRIEF FOR PETITIONER ALCOA.

STATEMENT.

This brief will be directed to answering contentions made by the respondents, Federal Maritime Commission and United States of America, in their answering brief. Insofar as we are able to do so, we will endeavor to avoid repetitions of arguments set forth in our opening brief.

I.

THE HISTORY AND INTERPRETATION OF THE SHIPPING ACT REVEAL THAT THE COMMISSION HAS NO AUDIT POWER.

Respondents seek to legitimize the Commission's *ultra vires* exercise of power by stating, without more, that there is no difference between an order for an audit and one for the production of documents. Without any explanation, respondents strive to bury the matter merely by reciting the

provisions of section 21 of the Shipping Act (B. page 4).^{*} However, as simple as this solution appears, it is clear the Commission can not in this fashion appropriate for itself authority not conferred by Congress.

The term "audit" is not in and of itself the controlling concept; it is, rather, what the term connotes that is decisive. An audit is an inspection, examination, comparison, and evaluation of accounts and charges that is characterized by its comprehensive, exhaustive, and final nature. The background of the Shipping Act, its legislative history, and its interpretation over a forty-eight year span reveal that the Federal Maritime Commission has no audit power, either under the very name of audit or under any other guise.

In form, the Shipping Act is a modification of the Interstate Commerce Act, 24 Stat. 379 (1887), as amended, 46 U. S. C. 20. *United States Nav. Co., Inc. v. Cunard S.S. Co.*, 284 U. S. 474, 481 (1932). However, Congress recognized that the regulation of water commerce presented many problems differing essentially from those involved in the regulation of railroad commerce. S. Rep. No. 689, 64th Cong., 1st Sess. 10 (1916). Consequently, Congress tailored many substantive regulatory provisions of the Shipping Act to fit the intended narrower jurisdictional spectrum of the Federal Maritime Commission.

When the Shipping Act was adopted in 1916, section 20 of the Interstate Commerce Act, 34 Stat. 594 (1906), read in part as follows:

"The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all time have access to all accounts, records and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records or memoranda

^{*} Respondent's Brief will be hereafter referred to as (B. page).

than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda."

This section confers on the Interstate Commerce Commission extensive and clearly defined audit powers. The right to inspect and to examine is expressly set out, as are the names of the documents and papers to be examined and the titles of the authorized examining personnel.¹ The section permits the Interstate Commerce Commission to prescribe the forms of accounts, records and memoranda, thereby enabling the Commission to establish uniform procedures among carriers to the end that audits can be more speedily and accurately completed.

The Shipping Act was introduced in Congress by Representative Alexander who was Chairman of the Committee which investigated the shipping industry from 1912 to 1914. As introduced by him, section 21 was substantially in its present form, the only alterations of substance in the intervening years being the changes in name of the successive administering bodies. See, *e.g.*, 1949 Reorg. Plan No. 6, eff. Aug. 19, 1949, 14 F. R. 5228, 63 Stat. 1069. The history of the Shipping Act in Congress shows that Congress purposely intended to deny the shipping administrators the authority to audit, to examine, or to inspect any document other than the required reports and papers filed in verification thereof. Congress was cognizant of the audit powers of the Interstate Commerce Commission, and the question of whether or not the authority administering the Shipping Act should exercise similar powers was expressly raised and answered negatively. The report of the House Committee on the Merchant Marine and Fisheries on the bill which became the Shipping Act, H. R. Rep. No. 659, 64th Cong., 1st Sess., detailed, at pages 32-33, Congressional

¹ The Interstate Commerce Commission has possessed the power to inspect from 1887, 24 Stat. 386. However, the power to copy and to inspect and examine lands, building and equipment was added in 1940, 54 Stat. 916.

reliance on the experience of the Interstate Commerce Commission under the administration and enforcement provisions of the Interstate Commerce Act and read as follows:

"While the part of the bill relating to the regulation of carriers by water differs necessarily and materially from the corresponding provisions of the interstate commerce act, the difference is not so radical that the administration and enforcement provisions of the latter act and the nearly 30 years' experience of the Interstate Commerce Commission cannot be adapted with slight modifications to the purposals of this bill."

Then the Committee proceeded directly to consider the examination and inspection question:

"Section 22 [i.e., section 21], relating to the requiring of information, confers upon the board only a part of the power of the Interstate Commerce Commission under Section 20 of the Interstate Commerce Act, by which the Commission is empowered to prescribe a uniform system of accounts as well as the form of all accounts, records, and memoranda to be kept by carriers subject to the act, and its examiners given access to such accounts for the purpose of inspection and examination. While it is well within the power of Congress to impose similar requirements upon carriers by water in interstate commerce, the Committee deems it neither advisable or necessary, at least at this time, to make the provisions of this bill any more burdensome in this respect upon carriers by water in interstate commerce than those imposed upon similar carriers operating under foreign flags and engaged in the foreign commerce of the United States."

Congress asserted its authority to impose stringent audit provisions on water carriers in interstate commerce but declined to exercise this authority. Since it has not prescribed rate authority over foreign flag carriers Congress has chosen to give lesser regulatory powers to the Federal Maritime Commission. As a result, the Commission can audit the books and papers of neither interstate nor foreign water carriers. The statement of limited

powers quoted above was adopted by the Senate Committee on Commerce which fully accepted the House report in favorably reporting out the bill. S. Rep. No. 689, 64th Cong., 1st Sess. 12-13 (1916). In addition, Representative Alexander made the same statement during the debate on the floor of Congress. 53 CONG. REC. 8082 (May 16, 1916). No exceptions to this interpretation were taken either in the House or in the Senate. 320 amendments urging changes in the bill were offered during the course of enactment but none pertained to any substantive part of section 21. A substitute bill offered to change other features of the bill in a radical fashion would have renumbered the section (53 CONG. REC. 12452), and the only actual amendment of the section changed "section 22" to "section 21." 53 CONG. REC. 13365 (August 29, 1916).

Thus, after the Act was adopted the Shipping Board did not possess the powers now contended for by the Commission in its order. It is settled that any administrative determination must be based on the governing law and must be within the granted authority. *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589 (7th Cir. 1945). No inferential amendment of section 21 by the Federal Maritime Commission, a body possessing no part of Congress' legislative power, is permissible. The Commission's power to adopt rules and regulations to govern its own proceedings does not extend to amendment of a statute but is limited to supplementation of express statutory functions and duties. Section 43 of the Shipping Act, 46 U. S. C. 841a.

It must be noted that after the adoption of the Intercoastal Shipping Act, 47 Stat. 1426 (1933), with the modifications of the Shipping Act occasioned thereby, section 21 was not amended to reflect the existence of power to audit. Section 21 and the other relevant provisions of the Shipping Act were incorporated in the Intercoastal Shipping Act merely by reference. Section 7 of the Intercoastal Shipping Act, 46 U. S. C. 847.

Further, section 21 makes willful noncompliance a misdemeanor and provides for a fine of not more than \$1,000

or for imprisonment for not more than one year upon conviction. This penal sanction is quite severe and, in line with settled principles, requires the statute to be construed strictly. *Yates v. United States*, 354 U. S. 298 (1957); *United States v. Resnich*, 299 U. S. 207, 209 (1936). As the Commission has no authority to audit under the express language of the statute the penal nature of the sanction imposed prevents an expansive interpretation of the section's terms.

Longstanding and consistent administrative policy and practice must not be reversed except for the most cogent reasons. *United States v. Leslie Salt Co.*, 350 U. S. 383, 396 (1956). At no time in nearly fifty years has the Commission exercised or claimed the powers asserted in this order. Agency authorities have recognized the non-existence of the audit power and have unavailably petitioned Congress to amend the statute. When amendments to the Shipping Act were being considered in 1961, the Secretary of Commerce wrote to Chairman Bonner of the House Merchant Marine and Fisheries Committee recommending that the Board's information-gathering powers under sections 21 and 27 of the Shipping Act of 1916 be so clarified and expanded as to give the "Board express power to inspect and to order the production of documents and information relevant to its responsibilities." The Secretary suggested that

"the Board should have access to, and the power to inspect, records of carriers and conferences which are maintained in the United States. Such power would be similar to that now vested in Interstate Commerce Commission under sections 20(6), 220(d), 313(f), and 412(d) of the Interstate Commerce Act (49 U. S. C. A. sec. 20(6), 320(d), 913(f), and 1012(d))." *Hearings Before Special Subcommittees on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives*, on H. R. 4299, 87th Cong., 1st Sess. (1961), page 34.

Mr. Stakem, Chairman of the Federal Maritime Board, recognized this limitation on the then-Board's authority

and repeated these remarks when he appeared with Mr. Pimper, General Counsel of the Board, to testify before the Committee. *Hearings, op. cit. supra, page 28.* In reply to a question by Representative Johnson as to the extent of the Board's subpoena power under section 27 of the Shipping Act, Mr. Stakem made the following statement:

"Now, when the House Judiciary Committee started its investigations, it was voluntarily cooperated with by the steamship companies or afforded the opportunity in response to subpoenas which were not limited to an alleged violation of the act as our subpoena is, and, through the cooperation of the lines, the staff of the subcommittee was able to look at the records themselves of all of the steamship companies that it visited.

We do not have that power. *We cannot inspect documents as such. We can subpoena documents only after we have alleged a violation of the act.*" *Hearings, op. cit. supra, page 479.* (Emphasis added.)

An amended section 21 proposed by the Secretary of Commerce and by the Board at the 1961 hearings was virtually identical with the relevant part of section 20 of the Interstate Commerce Act and read:

"The Board may require any common carrier by water or conference of such carriers, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent or employee thereof, to produce or to file with it, any report, record, book, paper, or other document or tangible thing, or a true copy thereof, whether or not located in the United States, or to file answers in writing to specific questions, appertaining to the business of such carrier or other person subject to this act, the same to be produced or filed in the form and at the time and place the Board prescribes, and to be under oath whenever the Board requires. The Board or its duly authorized agent or agents shall at all reasonable times have the authority, upon demand, to inspect and copy any such document or thing. Whoever fails to comply with any requirement or demand under this section shall be subject to a civil penalty of not more than \$100. for

each day of such default. Whoever willfully falsifies, destroys, mutilates, or alters any such document upon conviction to a fine of not more than \$10,000. or imprisonment for not more than *five years, or both such fine and imprisonment.*" (New matter italicized.)

This amendment was incorporated in Draft Revision No. 2 of a Committee Print of H. R. 4299, 87th Congress, 1st Session but was rejected and never became law, the Committee stating in its report:

"[O]verregulation of the American trade may result in shippers in other area of the world being put in a better competitive position. Thus your committee has rejected certain other proposals for rate and other controls and have only approved the minimum regulation felt necessary to protect the various interests."

In evaluating and rejecting this and other amendments, the House Committee made the following comment: "Without approving or disapproving such additional provisions, your committee took no action thereon feeling that their consideration should more appropriately be in connection with a separate legislative measure." H. R. Rep. No. 498, 87th Cong., 1st Sess. 14 (1961). In *Trans-Pacific Freight Conference v. Federal Maritime Commission*, 302 F. 2d 875 (D. C. Cir. 1962), this Court held, at page 879, that a request by the Commission for an amendment to the Shipping Act to authorize a particular type of action constituted an admission that amendment was needed and that the action was unauthorized without it. The same principle applies here.

Section 6(b) of the Administrative Procedure Act, 60 Stat. 240, 5 U. S. C. 1005(b), provides that "no process requiring a report, inspection, or other investigative act or demand shall be issued, made or enforced in any manner or for any purpose except as authorized by law." This section was enacted, in the words of the Senate Judiciary Committee's report, "to preclude 'fishing expeditions' and investigation beyond the jurisdiction or authority of an

agency." Sen. Doc. No. 248, 79th Cong., 2d Sess. 205 (1946). As the authority asserted by the Commission is not contained in section 21 and can not be made up out of the Commission's boundless zeal, the order under consideration here is unenforceable.

The limitation on the Commission's powers which prevents it from acting without express statutory authorization was stressed in the recent decision in *Federal Maritime Commission v. Anglo-Canadian Shipping Company, Ltd.*,F. 2d (9 Cir. July 31, 1964, not yet officially reported), in which the Court of Appeals held invalid Commission-prescribed Rule 12(k) of the Federal Maritime Commission's Rules of Practice and Procedure for discovery and production of documents. There, as here, the Commission asserted that the power to obtain documents was necessary if it was to carry out the responsibilities vested in it by the Shipping Act. This argument was rejected on the ground that the implied authority asserted must be specifically granted by Congress:

"The very fact that it was deemed necessary for Congress to enact an explicit statute authorizing subpoenas duces tecum in order for the agency to exercise that power is an indication of a purposeful withholding of the somewhat similar, but far more potent, power to order production of documents for discovery purposes. The Commission's rules (46 C. F. R. Secs. 201.131-133) governing the issuance of non-discovery subpoenas duces tecum are based upon Section 27, expressly authorizing that procedure. Rule 12(k) has no comparable explicit statutory foundation" (C. I. B. 7-31-64, p. 7).

The authority to audit can not be read into any of the other provisions of section 21. Section 21 empowers the Commission to require the filing of "any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier." Respondents strive to bolster the validity of the Commission's order by citing a string of disjunctive decisions (B. pages 4-5). Since the propositions these section 21 cases support are unstated, respondent apparently believes mere

citation renders them ineluctable. In reality, each is irrelevant to the present question and distinguishable from the present case. In no one of these cases did the Commission contend for or receive the right to audit. In each case the disputed order involved the filing of memoranda relating to rates. The orders in the cases cited by respondents run to regulated carriers and concern documents to and from the affected carriers, fellow conference members, freight forwarders, terminal operators, stevedores, and ship's agents. There is no intimation in any of these decisions that the Commission possesses the right to audit the books of a carrier or a non-regulated corporation, completely separate from and independent of the carrier.

The books, records, and memoranda covered by this order relate to those of the petitioner and to those of the Aluminum Company of America, the petitioner's parent company. The petitioner is a completely independent corporate entity. The Aluminum Company of America is not subject to the jurisdiction of the Commission since it is not a "common carrier" within the purview of section 21. Nor is it an "other person" as that term is defined by section 1 of the Act, that is, "any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water."

When Congress intends inspection provisions to reach a parent corporation that is neither a "common carrier" nor an "other person" it makes express provision for it. Thus, in the redoubtable section 20(5) of the Interstate Commerce Act Congress provided that the authority to copy and to inspect shall extend to "any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier." Since this section is the progenitor of section 21 of the Shipping Act, the deletion of a comparable provision from the latter section is controlling. Just as the Commission has no authority to reach the records and documents of the

Aluminum Company of America it can not in this round-about fashion require the petitioner, Alcoa Steamship Co. Inc., to produce them.

The terms "account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person" do not extend to the papers listed in the Commission's order. The order requires the auditing of certain described "books, records, and memoranda." These documents are not within the scope of section 21. The section does not require the filing of "books." The amendment recommended by the Secretary of Commerce and the Board in 1961, discussed above, would have expanded the section to include books. "Records," as used in section 21, refers to the records of agreements and contracts between the carrier and other persons. Applying the rule of *noscitur a sociis* to "account, record, rate" it is clear that "record" relates to and takes color and meaning from "account" and from "rate," each of these latter two terms having reference to consensual transactions. In the amendment proposed in 1961 "record" was not qualified by words of immutable content as in section 21. The "memorandum" of section 21 is restricted to documents supplementing or filling out rate agreements or understandings because the section refers explicitly to "any memorandum of facts and transactions appertaining to the business of such carrier. . . ." This provision differs markedly from section 20 of the Interstate Commerce Act which speaks of "all . . . memoranda." In section 21 the memoranda to be filed are defined and, thus, specifically restricted. Section 21 must be read carefully to fathom the meaning Congress intended these terms to have. This is borne out by an examination of the amendment submitted by the Federal Maritime Board which spoke broadly of "any report, record, book, paper, or other document or tangible thing." Comparing these broad provisions with the limited authority spoken of by the Secretary of Commerce and Mr. Stakem, it is clear this order is not a valid exercise of power.

Respondents assert the purpose stated in the Commission's order is sufficient (B. page 5). The only discernible purpose stated is verification of the report FMC-64. In the *Far East Conference v. Federal Maritime Commission*, F. 2d, (D. C. Cir. August 20, 1964, not yet reported), this Court noted the statement of purpose in that order made "reference to the particular sections of the statute. . . ." The order here makes no such reference for the reason that section 21 does not authorize verification via an audit. Section 21 supplies an exclusive and express mode of verification, stating that the "report, account, record, rate, charge, or memorandum shall be under oath whenever the Board or Secretary so requires. . . ." Since the statute does not authorize verification by audit the statement of purpose is inadequate.² The only other statement of purpose, if it be that, is the statement that "audits are absolutely necessary to the discharge of the Commission's responsibilities" (J. A. pages 12-13). However, as the respondents point out, this Court in *Hellenic Lines Limited v. Federal Maritime Board*, 111 App. D. C. 151, 295 F. 2d 138 (1961), declared a similarly conclusory statement of purpose inadequate and set aside the order in which the purpose was set out (B. page 5).

Respondents state that petitioner can not raise the question of vagueness of purpose because it was first raised in the reply memorandum in support of the request for an injunction (B. Page 6). But, respondents quote at length from the *Far East Conference* case, *supra*, to the effect that the order is relevant if the purpose is stated meaningfully (B. page 5). It follows that an attack on the relevancy of an order implies an attack on the purpose stated. The third ground for relief listed in the petition for review filed with this Court on June 2, 1964, challenges the relevancy of the order:

² In rewriting section 21 in General Order 11, The Commission was careful to state expressly and separately that a corporate officer must certify the required data (§512.4) and that an auditor will be permitted to examine and copy all working papers (§512.5).

"The commission's order goes beyond what is reasonably relevant to the Commission's statutory authority and is an undue burden in violation of petitioner's rights under the Fourth Amendment of the United States Constitution." (Petition page 4.)

Further, the third issue presented by petitioner in the prehearing stipulation filed with this Court on June 18, 1964, reads as follows:

"C. Is the Commission's order so broad that it goes beyond what is reasonably relevant to the Commission's statutory authority under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and constitute an undue burden on the petitioner?"

II.

THE PRESENT ORDER IS A RULE AND MUST CONFORM TO THE PROCEDURES FOR RULE MAKING, AS EXEMPLIFIED BY THE NOTICE AND HEARING GRANTED PRIOR TO THE PUBLICATION OF GENERAL ORDER 11.

Respondents assert there is no question of rule making involved in this proceeding (B. page 6). Beyond the fact that this is *formally* an appeal from an "order" the respondents' statement is not correct. Where another designation is more accurate the particular nomenclature attached to a directive by the Commission is not controlling. In fact, General Order 11, admittedly a rule making exercise, is called an order.

The Administrative Procedure Act reveals the Commission's directive is actually a rule. Section 2 of the Act, 5 U. S. C. 1001, defines both "order" and "rule":

"...

(c) 'rule' means the whole or any part of any agency statement of general or *particular applicability* and future effect designed to implement, interpret or prescribe law or policy or to describe the

organization, procedure, or practice requirements of any agency. . . .

(d) 'order' means the whole or any part of the final disposition . . . of any agency in any matter other than rule making." (Emphasis added.)

The crucial words in the rule definition are those italicized. They reveal this section was intended to vitiate older and more conceptualistic definitions of rule and order. Formerly the criterion for distinguishing rule from order was that the former typically applied to unnamed parties while the latter applied to named parties. The House Committee Report to the Act states the reason for the expanded definition brought about by the addition of "or particular" after the bill had already been passed by the Senate:

"The change of language to embrace specifically rules of 'particular' as well as 'general' applicability is necessary in order to avoid controversy and assure coverage of rule making addressed to named persons." Rep. of the House Jud. Comm., 79th Cong., 2nd Sess. 283, n.1 (1946).

These definitions are predicated on a dichotomy between rule making and adjudication. The distinctions between the two categories are developed in the ATTORNEY GENERAL'S MANUAL ON THE ADMIN. PROC. ACT (1947), at page 14:

"Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct."

This controversy comes within the Act's definition of "rule." The so-called order is one of "particular applicability." While the order seeks papers for the year 1962, it is of "future effect," because if the order is upheld its

precedential value will enable the Commission summarily to reach all other carriers, their subsidiary and parent companies and all their records for past and future years. The Commission is establishing future Commission "policy" via this order, which it considers an "implementation" or "interpretation" of section 21. Likewise, this order, like General Order 5 and General Order 11, prescribes the "procedure" or "practice" requirements of the Commission. But General Order 5 and General Order 11 were not published and did not become effective until notice had been given and hearings accorded to the affected parties. The order in this case is intended to supplement FMC-64 and is setting up a new requirement with which selected parties, regulated and non-regulated alike, will have to comply at the whim of the Commission.

Finally, the order-rule involved here is legislative. It is purportedly the product of an exercise of legislative power by the Commission, the Commission contending the **statute confers the power to issue the directive**. It is not altogether clear whether the respondents rely on an express or an implied grant of power. See, *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943). In either event it is settled that procedural rules designed to govern the agency's own proceedings are considered legislative rules, whether or not specific power is granted to issue such rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260 (1954).

Despite the form of this directive the order is actually a rule. The procedural incidents that attach to rule making must apply here. Parties affected by a rule or set of rules to be published by the Commission are entitled to notice and to a hearing prior to issuance. Administrative Procedure Act, §4, 5 U. S. C. 1003. The issuance of an order not involving a violation of the Shipping Act does not necessitate prior notice and hearing to be effective. 46 U. S. C. 822. The Commission's duality of enactment, through this directive and the issuance of General Order 11, deprives petitioner of its procedural rights. To construe this directive as an "order" will enable the Commission to issue policy,

practice, and procedural rules as orders, thus obviating the necessity of indulging affected parties the requisite hearings.

Respondents claim the general rule making procedure of General Order 11 and this directive are unrelated and cites this Court to the Wallace affidavit for verification of this proposition. An examination of the two documents shows this statement is groundless. Petitioner clearly demonstrates on page 11 of its brief that the central provision in each is that requiring audit. The purposes stated in the orders are equally vague. Like the stated purpose of the section 21 order, General Order 11 says the purpose of the rules is to enable the Commission to expedite the discharge of its duties (§512.1). The Forms and Instructions section of General Order 11 (§512.7) runs parallel to this order which has its analogue in FMC-64. FMC-64 is not a part of the order, but is tied closely to it since the audit is intended to verify that report. That one order purports to cover only the regulated trade and that the other is company-wide does not control the question of whether or not the two orders are related. Nor does the fact that the orders purport to cover different years control. The central question is whether or not section 21 grants the Commission the right to audit; this question is common to each order. Variation between the two orders are incidental to the power sought to be asserted by the Commission. A greater abuse of power under the one order than under the other does not change the relation between them.

Respondents' contention (B. page 7) that the filing of an appeal from each order is an implied acquiescence in the proposition that the two orders are unrelated is patently erroneous. Petitioner possesses a statutory right to appeal from each of the orders. Since—as between the two appeals—petitioner is powerless to order the priority of argument and decision before this Court, petitioner would risk the affect of *res judicata* in taking only one appeal. If petitioner had appealed from only General Order 11, it would be bound by the section 21 order after the time to appeal the latter had run.

III.

THIS UNAUTHORIZED ORDER IMPOSES AN
INTOLERABLE BURDEN ON THE PETITIONER.

Citing *United States v. Morton Salt Co.*, 338 U. S. 632 (1950), respondents state there is no question of unreasonable search and seizure here (B. pages 7-8). It has been demonstrated, however, that section 21 does not confer the authority to audit and that the order is not relevant to any lawful Commission function. Similarly, the order is too indefinite for enforcement in that the Commission, reaching into unregulated areas, has made a sweeping demand for virtually all papers in petitioner's possession covering the year in question. Respondents quote at length from the *Morton Salt* case, *supra*, to show the sweeping nature of the Commission's authority. But the quotation is not relevant to the question of authority, definiteness, and relevance. The respondents quoted this same passage out of context in their brief in *Montship Lines Limited v. Federal Maritime Board*, 111 App. D. C. 160, 295 F. 2d 147 (1961). In that case the Court dismissed the quotation as irrelevant:

“[T]he language in *Morton Salt* upon which the Government relies was not directed to the matter of purpose and relevancy, but rather to the issue of whether the Federal Trade Commission had power to compel reports absent “probable cause” to believe that the law was being violated” 295 F. 2d at 155.

Respondents' flaunting of their spirit of cooperation (B. page 8) does not hold up under examination. The Federal Maritime Commission's intent is to amend section 21 to confer on itself powers expressly withheld by Congress. In proceeding without according notice and a hearing to the petitioner the Federal Maritime Commission has attempted to stifle the petitioner's righteous protestations against the Commission's assumption of legislative power.

Respondents concede that if they succeed they will move to dismiss the appeal pending in Docket 1152 (General Order 11) (B. page 7). The Commission's attitude appears to be that it has nothing to lose in attempting the strategem under attack here. If it loses the present appeal it can still argue in the Docket 1152 appeal that the audit requirement is a lawful rule making exercise.

Respondents snip at petitioner's allegations of confidentiality by citing section 20 of the Shipping Act, 46 U. S. C. 819 (B. page 9). This section does not apply to this case. The stern prohibitions of section 20 against the disclosure of confidential information are relaxed only in certain specified instances. However, none of these instances is present here. Since the Commission has proceeded in a manner grossly in excess of its statutory powers no lawful enforcement process can issue. On the same note, the Commission is certainly not in this whole matter a government agent in exercise of its powers. Finally, no third party who has entrusted petitioner with confidential information has been identified by the Federal Maritime Commission. No third party, anonymous or otherwise, is "charged with or suspected of crime."

CONCLUSION.

For the foregoing reasons, petitioner prays that this Court

1. Declare invalid and set aside and annul the Commission's order of April 7, 1964;

2. Grant such other and further relief as the Court may deem proper.

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Dated: September 11, 1964.

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SUPPLEMENTAL JOINT APPENDIX.

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Prehearing Stipulation Dated June 18, 1964.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

against

UNITED STATES OF AMERICA and

FEDERAL MARITIME COMMISSION,

Respondents.

Docket No. 18667

PREHEARING STIPULATION

THE QUESTIONS PRESENTED

Petitioner would state the questions as follows:

A. Does the Commission under Section 21 of the Shipping Act, 1916, pursuant to which the Commission purports to act, have the authority to audit the books and records of Alcoa Steamship Company as being sought in the Commission's order?

B. Does the Commission have the authority to conduct an audit under its own rules and the Administrative Procedure Act?

C. Is the Commission's order so broad that it goes beyond what is reasonably relevant to the Commission's statutory authority under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, and constitute an undue burden on the petitioner?

Prehearing Stipulation Dated June 18, 1964.

Respondents would state the single question as follows:

Does the order constitute a valid exercise of the Commission's authority under Section 21, Shipping Act, 1916?

Respectfully submitted,

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Dated: June 18, 1964

Prehearing Order Dated June 27, 1964.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,667

September Term, 1963

**ALCOA STEAMSHIP COMPANY, INC. v. FEDERAL MARITIME
COMMISSION AND UNITED STATES OF AMERICA**

Before: McGOWAN, Circuit Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: June 27, 1964

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

No. 18,667

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 30 1965

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Nathan J. Paulson
CLERK

No. 18,818

PETITION FOR REHEARING

By a decision dated April 15, 1965, the Court remanded a Federal Maritime Commission order and a rule which had been issued under Section 21 of the Shipping Act, 1916, and which sought to obtain information so that the Commission might verify reports filed with it by domestic offshore carriers. The Court remanded these two cases to the Commission so that it might determine whether such an audit "would operate as a discriminatory burden on American-flag carriers" (slip op., p. 11).

Although not agreeing with the Court's opinion as to the scope of the Commission's powers under Section 21, the Commission has authorized counsel

to invite the Court's attention to the provisions of Federal Maritime Commission Order 53 (amended), a copy of which is attached to this petition as an appendix, and the provisions of 5 U.S.C. 139b and 18 U.S.C. 1905, which had not been cited in our briefs. These relevant materials establish, we believe, that any information made available to the Commission during the course of Commission audits is protected from a loss of confidentiality. §5.03 of F.M.C. Order No. 53 (amended) provides that "no Commission employee shall divulge restricted commercial or economic information," and §6.04 provides for "disciplinary action, ranging from warning to removal, in accordance with the gravity of the offense" for violation of this confidentiality requirement.^{1/} The Commission routinely treats all reports submitted pursuant to Section 21 of the Shipping Act, 1916, and all information obtained during the course of audits as "administratively restricted" or confidential. Accordingly, the Commission is of the opinion that no prejudicial loss of confidentiality can result merely by an audit. The respondents therefore respectfully request the Court to reconsider its opinion for the purpose of deciding whether or not the Commission's order and rule should be upheld in the light of the foregoing new material.

^{1/} Title 18 U.S.C., Section 1905 provides for a fine of not more than \$1,000 or imprisonment for not more than one year, or both, for any officer or employee of the United States who discloses confidential or restricted information received by him in the course of his employment. Title 5 U.S.C., Section 139b carries this provision over to information transmitted to another government agency and makes the same penalties applicable to employees of the second agency.

II

If the Court is of the view that the foregoing new material does not obviate the problem of prejudicial loss of confidentiality, at least at the audit stage, the respondents request clarification of the Court's opinion. It is unclear to the respondents whether, under the Court's decision, the Commission may obtain an American-flag carrier's records of its foreign operations, notwithstanding that there may be a prejudicial loss of confidentiality, if the Commission determines that its need for the information outweighs such prejudice as may result. The respondents therefore seek to have the Court clarify what the Commission's powers are in respect to obtaining such information.

Respectfully submitted,

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Walter H. Mayo III
Attorney

Department of Justice

Federal Maritime Commission

April 29, 1965
Washington, D. C.

FEDERAL MARITIME COMMISSION

COMMISSION ORDER

MANUAL OF ORDERS

REVOKES

NO. 53 (Amended)

EFFECTIVE DATE
March 11, 1963

SUBJECT

STANDARDS OF CONDUCT FOR FEDERAL MARITIME COMMISSION EMPLOYEES

Section 1. General Provisions

1.01 Chairman and the Commissioners - The Chairman and the Commissioners, as Presidential Appointees, are subject to the provisions of Executive Order 10939 dated May 5, 1961, and applicable laws and regulations on this subject.

1.02 Purpose - The purpose of this order is to set forth basic ethical standards of official conduct for all other officers and employees of the Federal Maritime Commission, including standards relating to conflicts of interest and private business activities.

1.03 Applicability - This order applies to all persons included within the term "employee" as defined below.

1.04 Definitions - For purposes of this order:

1. "Commission" means the Federal Maritime Commission.
2. "Regular Government Employee" means every employee of the Commission who is not a "special government employee" as defined in 3. below.
3. "Special Government Employee" shall mean an officer or employee of the Commission who is retained, designated, appointed or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full time or intermittent basis.
4. "Transaction involving the Government" means any proceeding, application, investigation, request for a ruling or other determination, contract, claim, case or other particular matter in or to which the United States is a party or in which the United States has a direct and substantial interest, including any formal or informal proceeding conducted by or at the direction of the Commission.
5. "Official responsibility" as used herein means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Commission action.

Section 2. Policy

2.01 General Principles - Apart from statute, there are certain principles of fair dealing which have the force of law and which are applicable to all officers of the Government. A public office is a public trust. No public officer can lawfully engage in business activities which are incompatible with the duties of his office. He cannot, in his private or official character, enter into engagements in which he has, or can have, a conflicting personal interest. He cannot allow his public duties to be neglected by reason of attention to his private affairs. Such conflicts of interest are not tolerated in the case of any private fiduciary, and they are doubly proscribed for a public trustee. (40 Ops. Atty. Gen. 187, 190).

2.02 Policy of the President - The President has stated the basic ethical considerations in official conduct as follows:

"No responsibility of government is more fundamental than the responsibility of maintaining the highest standards of ethical behavior by those who conduct the public business. There can be no dissent from the principle that all officials must act with unwavering integrity, absolute impartiality and complete devotion to the public interest. This principle must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter."
---Special Message to Congress, April 27, 1961.

2.03 Special Requirements of the Commission - The close and sensitive relationship between the Commission and the shipping industry and related activities and those who utilize the services of the industry calls for special vigilance on the part of all officers and employees to avoid any appearance of impropriety. The regulations set forth in this order have been adopted to promote the efficiency of the service in the light of the particular ethical and administrative problems arising out of the work of the Commission.

2.04 Limitations on Private Activities and Interests - It is the policy of the Commission to place as few limitations as possible on private activities or interests consistent with the public trust and the effective performance of the official business of the Commission. There is no general statutory or regulatory limitation on the conduct of private activities for compensation by officers or employees of the Commission when the private activity is not connected with any business of the Government with which the employee may have a relationship by reason of his Government position. When the private activity does not touch upon some such interest,

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C. O. 38 (Amended)

it may be conducted if it falls outside applicable statutory limitations and regulatory limitations.

Section 3. Statutory Limitations

3.01 Certain statutory limitations relating to private activities for compensation, salaries from other sources, and gratuities are cited and summarized in this Section. In cases of doubt on any question of statutory application, the employee should consult the text of the statute itself and legal counsel. Violations of these statutes can result in fines or imprisonment, or both.

1. Section 301 of Reorganization Plan No. 7 of 1961, continues the applicability of the third sentence of Section 201(b) of the Merchant Marine Act of 1936, which prohibits any officer or employee of the Commission to be in the employ of any other person, firm, or corporation, or to have any pecuniary interest in, or hold any official relationship with, any carrier by water, shipbuilder, contractor, or other person, firm, association or corporation with whom the Commission may have business relations.

2. Title 18, U.S.C. 201 covers the solicitation, receipt, offer or giving of bribes to influence official action or testimony and provides separate and distinct penalties for violations.

3. Title 18, U.S.C. 203 (a) prohibits any officer or employee from soliciting or receiving compensation for services rendered on behalf of another person before a Government Department or Agency in relation to any particular matter in which the United States is a party or has a direct and substantial interest; and (b) makes it unlawful for anyone to offer or pay compensation the solicitation or receipt of which is barred by (a) above.

4. Title 18, U.S.C. 205 prohibits any officer or employee from acting as agent or attorney for prosecuting any claim against the United States, whether for compensation or not; prohibits him from receiving a gratuity, or a share or interest in any such claim, for assistance in the prosecution thereof; and prohibits him from acting as agent or attorney for anyone else before a department, agency or court in connection with any matter in which the United States is a party or has a direct and substantial interest.

This section does not prohibit an officer or employee from representing another person, without compensation, in a disciplinary, loyalty, or other personnel matter or from giving testimony under oath or making statements required to be made under penalty for perjury or contempt.

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C. O. §2 (Amended)

The Chairman may, under this section, grant a limited waiver of the restrictions to one who represents his own parents, spouse or child, or a person or estate he serves as a fiduciary but such waiver cannot extend to those matters in which he has participated personally or are subject to his official responsibility.

5. Title 18, U.S.C. 207 prohibits a former officer or employee from acting as agent or attorney for anyone other than the United States in matters involving a specific party or parties wherein the former officer or employee participated personally and substantially while holding a Government position. If he did not participate as above, but the matter involves a situation within the area of official responsibility of a former officer or employee he may after one year act as agent or attorney in such matter.

6. Title 18, U.S.C. 208 prohibits an officer or employee from participating in his official capacity in any matter in which he, his spouse, minor child or partner has a financial interest; he must also remove himself from a matter in which a business or non-profit organization with which he is connected or is seeking employment has a financial interest. A waiver may be granted by the Chairman if the outside financial interest is deemed not substantial enough to have an effect on the integrity of his services.

7. Title 18, U.S.C. 209 prohibits an officer or employee from receiving, and anyone from paying him, any salary or remuneration from a private source as compensation for his services to the Government.

8. Title 18, U.S.C. 218 grants the President and, under Presidential regulations, an agency head the power to void and rescind any transaction or matter in relation to which there has been a final conviction for a violation of the conflict of interest or bribery laws.

9. Since the Commission does not presently employ nor does it contemplate the employment of "Special Government Employees", as defined in Section 1.043 of this order, the applicable sections of Title 18, U.S.C. are only being noted herein for reference purposes in the event the situation should change. They are Title 18, U.S.C. 201, 203, 205, 207, and 208. Basically the same rules apply for both classes of employees but Public Law 87-349 lessened the impact of the laws on the "Special" category.

Section 4. Transaction of Official Business with Former Government Employees Who "Change Sides"

4.01 No Commission employee shall knowingly transact official business with any former Government employee who assists, whether or not

for compensation, any other person, in relation to any transaction involving the Government in which the former Government employee at any time participated personally and substantially as a Government employee through approval, disapproval, recommendation, decision, the rendering of advice, investigation, or otherwise, except after prior authorization as provided in Section 6.

Section 5. Other General Regulatory Limitation

5.01 Gifts, Future Employment, and Social Relations - No Commission employee shall (1) solicit or accept, directly or indirectly, any gift, favor, or service from; or (2) discuss or consider his future employment with; or (3) become unduly involved, through frequent social engagements (a) with any person outside the Government with whom he transacts business on behalf of the United States or whose interests may be substantially affected by actions of the employee or, with respect to (1) and (3) above, actions of the Commission; or (b) in circumstances in which acceptance may result in, or create the appearance of resulting in:

1. Use of public office for private gain.
2. An undertaking to give preferential treatment to any person.
3. Impeding Government efficiency or economy.
4. Any loss of complete independence or impartiality.
5. The making of a Government decision outside official channels.
6. Any adverse effect on the confidence of the public in the integrity of the Government.

5.02 Abuse of Office or Official Information

1. No Commission employee shall engage, directly or indirectly, in any personal business transaction or private arrangement for the purpose of furthering a private interest, including any investment, speculation, or employment, which (a) accrues from or is based upon his official position or authority; or (b) utilizes, or permits another to utilize, resources or information to which he has access by reason of his position or authority where the resources are not available to the general public or the information has not become part of the body of public information.

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C. O. 58 (Amended)

2. Consultations, Lectures, Discussions, Writings, or Appearances

- (1) In addition, no Commission employee shall receive compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which (a) is devoted substantially to the responsibilities, programs, or operations of the Commission; or (b) draws substantially upon data or ideas to which he has access by reason of his position or authority but which have not become part of the body of public information.
- (2) As used in this subsection, "the body of public information" shall mean information which has been disseminated widely among segments of the public which may be affected by or interested in the information concerned, or which is known by such segments of the public to be freely available on request to a Government agency.
- (3) The foregoing restriction shall not preclude:
 - (a) Receipt of bona fide reimbursement, to the extent permitted by law (see 36 Comp. Gen. 268), for actual expenses for travel and such other necessary subsistence as is compatible with this order and in which no Government payment or reimbursement is made: Provided, however, that there shall be no reimbursement or payment on behalf of the official for entertainment, gifts, excessive personal living expenses, or other personal benefits;
 - (b) participation in the affairs of charitable, religious, non-profit educational, public service or civic organizations, or the activities of national or state political parties not proscribed by law; or
 - (c) awards for meritorious public contribution given by public service or civic organizations; or
 - (d) lectures, discussions, writings, or appearances which involve only incidental discussion of

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the responsibilities, programs, or operations of the Commission and which involve only information which has become part of the body of public information.

- (4) Each Commission employee who undertakes, for compensation or anything of monetary value, any consultation, lecture, discussion, writing, or appearance the subject matter of which (a) involves the responsibilities, programs, or operations of the Commission; or (b) draws upon data or ideas to which he has access by reason of his position or authority but which have not become part of the body of public information, shall obtain authorization for receipt of the compensation or other things of value in accordance with the procedure in subsection 6.03 of this order.

5.03 Divulgence of Restricted Information - No Commission employee shall divulge restricted commercial or economic information, or restricted information concerning the operations of any Government agency, or release any such information in advance of the time prescribed for its authorized release.

5.04 Acquisition or Retention of Conflicting Interests and Engagement in Conflicting Activities - No Commission employee shall, directly or indirectly, acquire or retain financial interests, or engage in private activities or employments, which tend to conflict with the full, impartial, and effective performance of his official duties or with the policies and best interests of the Commission or which tend to reflect discredit on the Government or the Commission.

5.05 Transaction of Official Business in the Presence of a Disqualifying Interest - No Commission employee shall participate in any manner, on behalf of the United States, in the negotiation of contracts, the making of loans, the fixing of rates, or the issuance of valuable permits or certificates, or in any investigation or prosecution, or in the transaction of any other official business, which affects chiefly a person (1) by whom he has been employed or with whom he has had any economic interest within the preceding two years; or (2) with whom he has any economic interest or any pending negotiations concerning a prospective economic interest, except with express prior authorization as provided for in Section 6.

5.06 Inducement to Provide Anything of Economic Value - No Commission employee shall attempt, directly or indirectly, to induce

another person to give, pay or provide anything of economic value, for any purpose other than payments to the United States, or payments for obligations already incurred, whenever the employee has reason to believe that the other persons's private interest may be affected by the actions of the employee or of the Commission except with express prior authorization as provided for in Section 6. The foregoing restriction shall not preclude participation in the affairs of charitable, religious, non-profit educational, public service or civic organizations, provided that no person, whose private interests may be affected by the actions of the employee or of the Commission shall be treated differently from other persons affected.

5.07 Utilization of Government Time or Resources - No Commission employee shall utilize, or permit others under his control to utilize, Government time or resources, directly or indirectly, for any activities other than (1) official business; or (2) an activity authorized as provided for in Section 6.

5.08 Appearance of Violation - Each Commission employee shall conduct his personal and official affairs in such a manner that no reasonable suspicion or appearance of the violation of the foregoing principles can arise.

Section 6. Administration

6.01 Indirect Activity - The administrative regulations of this order, both the statutory provisions adopted as administrative regulations in Section 3 and the regulations in Sections 4 and 5, together with the responsibility for obtaining prior authorization in accordance with this Section, apply equally when the private activity is undertaken by any other person acting for or in concert with an employee of the Commission.

6.02 Responsibility of Employees - It is the personal responsibility of each Commission employee to ascertain that his activities and interests are permissible under this order. He should obtain written prior authorization of any questionable activity or interest as provided for in this Section. Each employee granted such authorization is responsible for confining such activity or interest to the scope and intent of the authorization. If circumstances change, or the nature of extent of the activity or interest changes in such manner as to involve the possibility of a violation of this order, the employee is responsible for obtaining further written prior authorization before continuing in the activity or interest.

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6.03 Authorizations - All requests for authorizations required under this order shall be addressed to the Chairman of the Federal Maritime Commission or his designated representative. When granted, authorizations will be in writing and a copy of each authorization will be filed in the employees' official personnel file.

1. Where an activity requested to be authorized can be conducted as official business, it shall not be authorized as a private activity, but shall be conducted as official business. If an activity has some of the characteristics of official business and some of the characteristics of private business, and if it is not practicable to keep official business separate from private business, it shall be classified, for the purpose of this order, as private business.

2. Where authorizations involve speaking, writing, or teaching, use of the official title of an employee for identification purposes may be authorized, provided the employee makes it clear that his statements and actions are not of an official nature.

3. If an authorization has been granted for a specific activity or interest, and the activity or interest is subsequently deemed to constitute a violation of this order, the employee concerned shall be notified in writing of the cancellation of the authorization and shall modify or stop the activity or interest involved.

6.04 Violations - Violation of, or failure to comply with, this order will be cause for disciplinary action, ranging from warning to removal, in accordance with the gravity of the offense.

6.05 The Director, Bureau of Investigation, under the direction of the Executive Director, shall be responsible for the enforcement of the requirements set forth in this order.

Thos. E. Stakem

Thos. E. Stakem
Chairman

Distribution - All Employees

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented to the Court in good faith and not for delay.

John C. Hunt
Attorney
Federal Maritime Commission

April 29, 1965

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 10 1965

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

Nathan J. Paulson
CLERK
No. 18,667

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

No. 18,818

ANSWER TO PETITION FOR REHEARING

Petitioner, Alcoa Steamship Company, Inc., opposes a rehearing in these cases on the ground that at the present time Respondents' request is premature. It is respectfully submitted that in presenting to this Court the kind of petition presented here, Respondents are endeavoring to circumambulate the mandate of the Court on remand to the Federal Maritime Commission.

The last sentence of the Court's opinion is brief and to the point: "We think the Commission should be given the

opportunity to reconsider both its rule and its order in light of this opinion." This directive is as clear and unequivocal as Respondents' Petition for Rehearing is evasive, sophistic, and ambiguous. Taken at its face value, it is not certain whether the Petition evidence an attempt at compliance with the Court's ruling; whether it presents for a new decision questions that have already been decided; or whether it attempts to shift back to the Court the determination of an issue that was committed to the Commission for resolution.

To date, the Federal Maritime Commission has given no outward sign that it was considering the problem committed to it by the Court. The agency has not initiated any investigation, study, or other proceeding directed to the question of "whether audit would operate as a discriminatory burden on American-flag carriers." The Commission has not requested Petitioner to furnish for consideration any opinions, data, testimony, or other evidence bearing on this question. Nor is Petitioner aware that the Commission has asked any other interested or similarly situated parties to comment on this matter. Indeed, aside from a press release to the effect that "US Court Decision Baffles FMC" (JOURNAL OF COMMERCE, vol. 283, no. 20,889, April 21, 1965, page 8), the Federal Maritime Commission has made no public announcement that it would consider and decide the question raised in the Court's decision. Thus, as it is unlikely that the

Federal Maritime Commission would resolve so weighty a problem in an informational vacuum, it must be presumed that the Petition for Rehearing, standing alone, is not intended to serve as a serious, full, and adequate response to the Court's directive.

After full briefing and argument in these two cases and after the rendering of a studied decision, Respondents present to the Court for the first time several statutory provisions and a recently disinterred and previously ignored administrative order which, it is asserted, will ensure that "any information made available to the Commission during the course of Commission audits is protected from a loss of confidentiality." (Petition, page 2). In fact, these few provisions are startlingly irrelevant to the present problem and do not stand for the propositions for which they are cited.

Section 5.03 of F.M.C. Order No. 53 (amended), which Respondents cite only in part, reads in its entirety as follows:

"Divulgence of Restricted Information - No Commission employee shall divulge restricted commercial or economic information, or restricted information concerning the operations of any Government agency, or release any such information in advance of the time provided for its release."

This provision does not deal with confidential information. It concerns only information that is labelled "re-

stricted" and even provides for the eventual release of such information. Order No. 53 does not provide any criteria for the determination of which information is to be restricted permanently [i.e., truly confidential] and which information is to be restricted but temporarily. Manifestly, as neither the Shipping Act of 1916 nor the Intercoastal Shipping Act of 1933 treats of the Commission's duty of confidentiality, there exists in no one of the statutes enabling the Commission to function any statutory guidelines or immutable limitations on the Commission's treatment of information received. Thus, within the framework of the shipping legislation, there are no stated or express bounds on the Commission's power to use information —however confidential— in any way and at any time it chooses to do so.

As this Court pointed out in its decision:

"Apparently, Congress considers the privacy of corporate records from commercial competitors an important condition of inspection by a regulatory agency. Yet these conditions, too, are absent from Section 21." (footnote omitted).
(slip op., page 11).

As the Court recognized in its opinion, when Congress intends that an administrative agency shall have access to financial and economic records which, owing to their nature, must remain confidential, it so provides in the agency's enabling statute and elaborately controls the precise conditions under which and the very parties to whom information

may be revealed.^{1/} It is not left to the regulatory agencies to evolve, at will, their own standards of confidentiality.

Title 5 U.S.C., Section 139b, cited by Respondents, has no place in this inquiry as it relates only to inter-agency violations of confidentiality and does not cover confidential information released to commercial competitors or to the public at large. The section generally concerns the information collection powers of the Bureau of the Budget and, incidentally, provides in certain instances for a hearing before the Director of the Bureau of the Budget to determine the necessity for information requested.

Despite the contrary implication contained in Respondents' Petition (Petition, page 2), Title 18 U.S.C., Section 1905 does not treat of confidential and restricted information and does not equate the two concepts, "confidential" and "restricted." This section is inapposite since it does not state what information is confidential but merely prohibits the disclosure of information when disclosure is "not authorized by law." Like Order No. 53, this section can not stand alone. To give this section meaning one must resort to some other source, like the statutes listed in the footnote below

1/ In addition to the statutes cited by the Court, see, e.g., Federal Trade Commission Act, 38 Stat. 724(1914), 15 U.S.C. § 50; Public Holding Company Act, 49 Stat. 834(1935), 15 U.S.C. § 79v; Internal Revenue Code, 68A Stat. 753(1954), 26 U.S.C. §§6103, 7213. See, also, the elaborate regulations on inspection of tax returns, Fed. Tax Regulations, Part 458, filling 42 pages.

which appear in the agencies' enabling statutes. The only reference point for Order No. 53, however, is the Federal Maritime Commission's discretion.

Respondents state at page 2 of their Petition that

"The Commission routinely treats all reports submitted pursuant to Section 21 of the Shipping Act, 1916, and all information obtained during the course of audits as 'administratively restricted' or confidential."

This statement is false. In this sentence, the Commission seeks to analogize "restricted" and "confidential." With reference to the Commission's statutory powers, as has previously been indicated, this notion is meaningless. None of the sundry provisions cited by Respondents has hitherto prevented the Commission from releasing to the public information submitted with the express understanding that it would be kept confidential. Nor does anything of any protective value appear which would prevent the Commission from following a similar course in the future.

The underlying purpose of General Order No. 11 is to obtain financial and economic information. Often, such information is utilized in rate investigations in which public hearings are not infrequently held. In such proceedings, the Commission uniformly releases to interested members of the public any confidential information made use of by the Commission's staff during the proceedings.

Thus, in Docket No. 916, West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Trade Investigation, the Commission issued a Section 21 order demanding the production of certain confidential documents. American-flag carriers, such as American President Lines and American Export Lines, furnished the documents but the foreign-flag carriers who were parties to the proceedings refused to comply. Subsequently, despite vigorous protests, the Hearing Examiner spread all these documents on the public record and voluntarily furnished copies to all the parties of record. The Commission's rationale appears to be that despite any assurance of confidentiality given by staff members, any intervening party is entitled to have access to such data once any part of it is used to support agency findings. The best statement of this viewpoint appears in a proceeding of the Maritime Subsidy Board, the sister agency of the Federal Maritime Commission. In Docket No. CA-4, American Export Lines, Inc., Shipbuilding Contract Appeal(1964), the Maritime subsidy Board held, with respect to data submitted in confidence, that inasmuch as Staff Counsel had relied on this data for the purpose of developing significant facts in the public record, "these data necessarily thereby lost any confidential or privileged status that may theretofore have been accorded to said data." (C.I.B., vol. 68, no. 127, June 19, 1964, page 4).

Assuming, for the moment, the applicability of the

disciplinary provisions cited by the Commission does not change the situation. One breach of a promise of confidentiality would suffice to blunt forever a crucial competitive edge that had been developed over a long period of years. The post facto disciplinary action provided for in these statutes is hardly commensurate with the loss that the Petitioner might sustain, even if one assumes that such disciplinary action might be successfully invoked by a carrier.

The Commission is not prevented from functioning effectively by the denial of access to such confidential information. Section 22 of the Shipping Act (46 U.S.C. §821) allows the Commission to initiate, sua sponte, an investigation into any matter covered by that Act or the Intercoastal Shipping Act. Section 27 of the Shipping Act (46 U.S.C. §826) further allows the Commission, after the initiation of an investigation, "by subpoena to compel the attendance of witnesses and the production of books, papers, documents, and other evidence from any place in the United States at any designated place of hearing." These two sections so dovetail that the Commission is fully equipped to effectuate its rate regulatory powers without laying bare for the benefit of commercial competitors necessarily confidential corporate information.

Confidentiality is not the only element of the "dis-

criminatory burden on American-flag carriers" that is al-
luded to in this Court's opinion. Since the Shipping Act,
unlike the Interstate Commerce Act, does not give the Com-
mission the power to prescribe a uniform system of accounts
and does not mandate that only one such system is to be
maintained, a non-subsidized carrier subjected to audit
would be put in the position of maintaining two separate
accounting divisions: one to handle compliance with the
Commission's orders of audit and another to handle the book-
keeping operations in line with conventional accounting prac-
tices. Indeed, it has been the experience of subsidized
operators, who accept governmental auditing as a condition
of their subsidy contracts, that completely separate sets
of records are necessary to fulfill the conditions of their
contracts with the Maritime Administration. As foreign-flag
carriers can not be subjected to such porcedures, they will
necessarily be free from the additional business expenses
involved.

In its concluding statement, Respondents request the
Court to weigh prejudicial loss of confidentiality with the
Commission's statement of necessity. It is not apparent
that the Court's decision provides for such a balancing
test or that the impact of a prejudicial loss of confiden-
tiality can be measured so relatively. Rather, it would
appear that if audit places a discriminatory burden on Amer-
ican-flag carriers and if the possiblity of prejudicial loss
of confidentiality is a fact, there can exist no stronger

evidence of Congressional intent not to impose on the United States merchant fleet an obligation so onerous as to threaten its very survival.

As this Court recognized (slip op., page 8), Congress has been ever aware of the dangers of overregulation of the American-flag carrier and to that end, in enacting the 1961 amendments to the Shipping Act of 1916, approved only the minimum regulation necessary to protect the various interests. It seems apparent that the drafters and revisers of the Shipping Act intended that the American-flag merchant marine, already shackled with higher operating costs, should not be regulated by the Federal Maritime Commission to any greater degree than are foreign-flag carriers, and that the very act of more stringent regulation of American carriers will open the floodgates to prejudices and discriminations of every sort to supplement the threat of loss of confidentiality.

Petitioner respectfully requests the Court to deny this Petition for Rehearing. Until and unless the Commission makes some cogent and unequivocal response to the question stated in the Court's decision, there can be no final resolution of these cases. And, if the Commission properly directs its attention to its assigned task, the conclusion reached by it may foreclose the necessity for any further proceeding be-

fore this Court.

Respectfully submitted,

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May 7, 1965
New York City

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of May, 1965, served the foregoing document upon all the persons listed below by mailing via first class mail, postage prepaid, a copy to each such party:

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Walter H. Mayo III, Esq.
Federal Maritime Commission

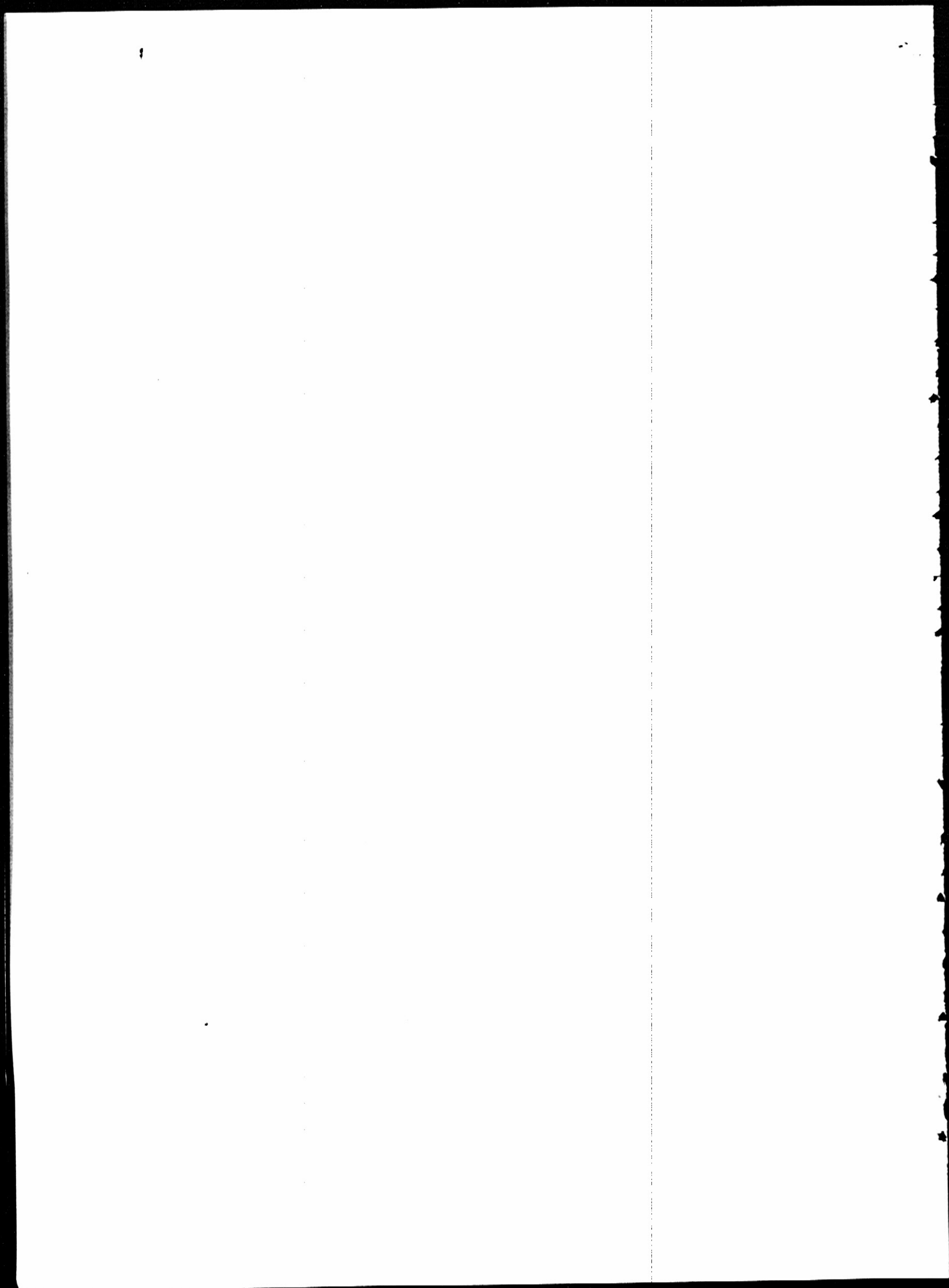


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BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

NO. 18,667

FILED AUG 25 1964

ALCOA STEAMSHIP COMPANY, INC.,

Nathan J. Paulson
Petitioner, CLERK

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF ORDER OF
THE FEDERAL MARITIME COMMISSION

139

William H. Orrick, Jr.
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James L. Pimper
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Gerald Kadish
Attorney

Walter H. Mayo, III
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Department of Justice

Federal Maritime Commission

August 21, 1964
Washington, D. C.

QUESTION PRESENTED

Does the order constitute a valid exercise of the Commission's authority under section 21, Shipping Act, 1916?

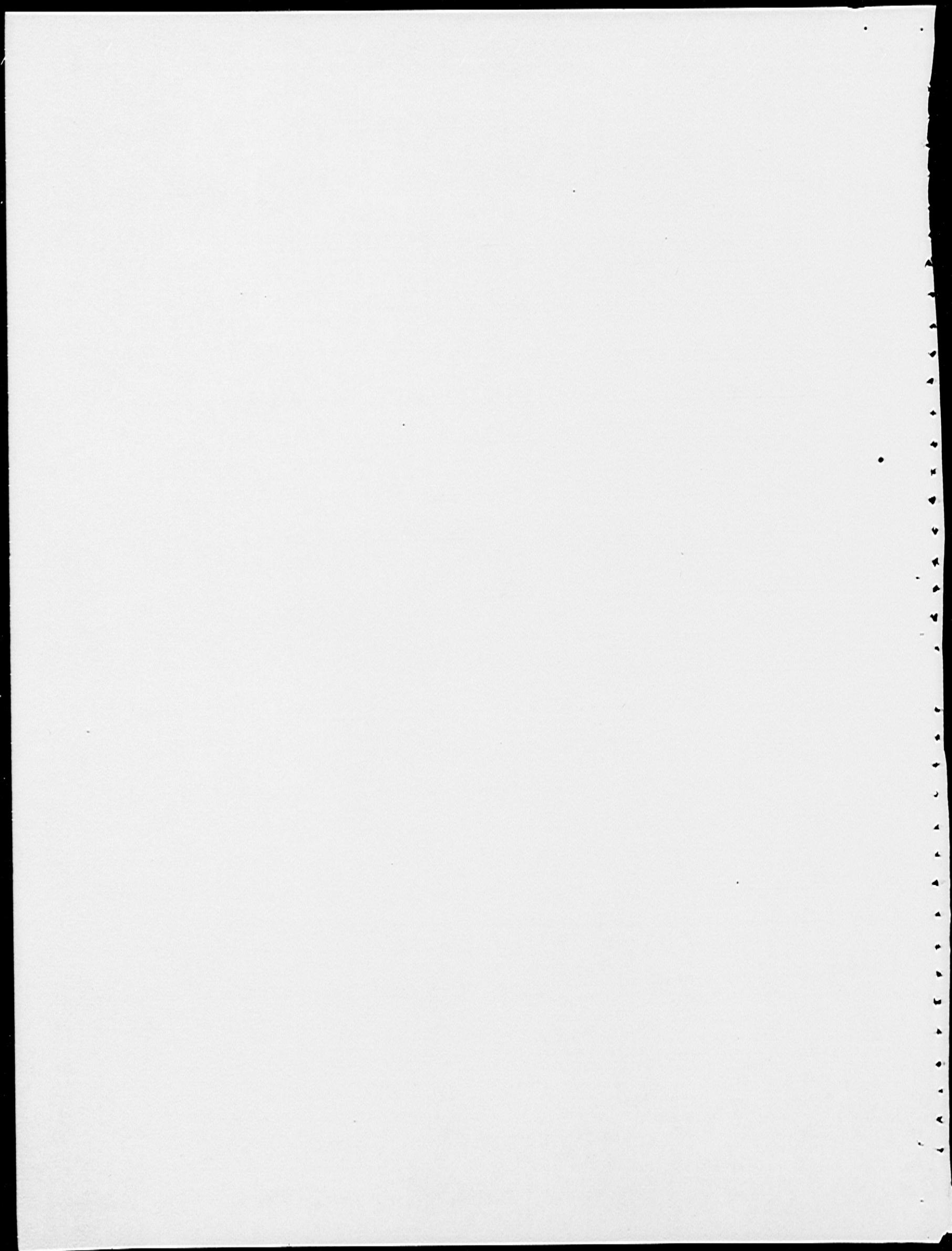
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Federal Maritime Commission Docket No. 1152, Reports of Rate Base & Income Account for Domestic Offshore Carriers	7

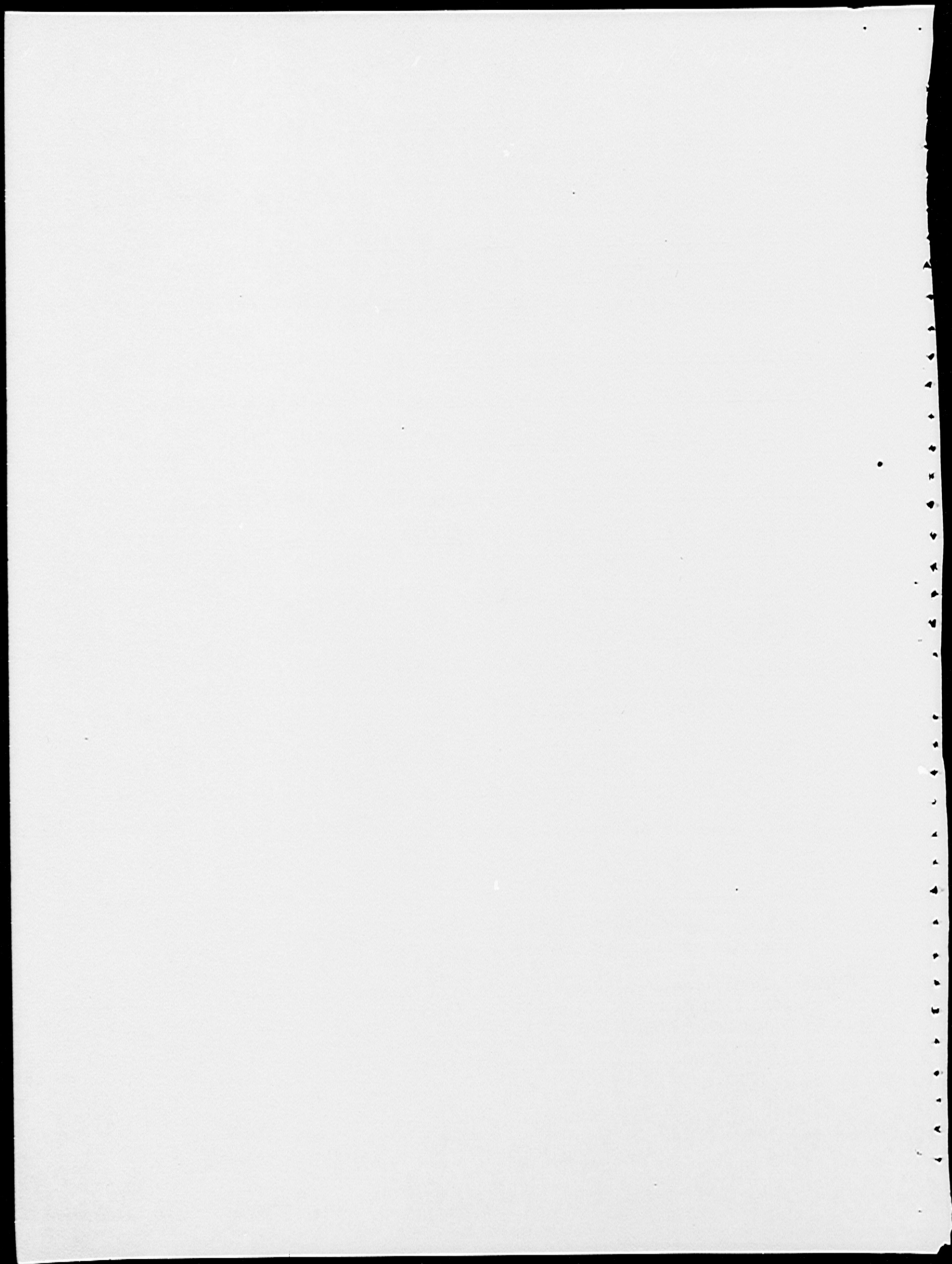


COUNTERSTATEMENT OF CASE

The order of the Federal Maritime Commission under review herein was issued on April 7, 1964, pursuant to section 21 of the Shipping Act, 1916 (46 U.S.C. 820). The order advises petitioner, a common carrier by water engaged in the domestic offshore commerce of the United States, over which the Commission has extensive regulatory jurisdiction pursuant to the Intercoastal Shipping Act, 1933, and the Shipping Act, 1916,^{1/} that in order to evaluate and verify a financial report filed by petitioner for the year 1962 (Form FMC-64), certain data specified in the order is required. The purpose of the order is to "verify" the report so filed, and the order was issued only after informal attempts to audit the books and records called for in the order had failed. On December 17, 1963, the Managing Director of the Commission advised the petitioner that the Commission's accountants desired to "verify the accuracy of the financial report which you submitted on Form FMC-64 for the calendar year 1962, and to determine whether or not the report was compiled in accordance with the instructions embodied in the Form" (J.A. 9). Petitioner declined to allow the Commission's accountants to conduct the audit as requested (J.A. 10-11). Thereupon the order now under review was issued.

Petitioner sought in this Court a temporary stay and interlocutory injunction against the effectiveness of the order. Memoranda were submitted both by petitioner and by respondents, oral argument was held before the

^{1/} See, e.g. sections 3 and 4 of the Intercoastal Shipping Act, 1933, (46 U.S.C. 845 and 845a) for the Commission's rate regulatory powers in the domestic offshore trades.



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Court on July 16, 1964, and on July 22, 1964, the Court issued its order denying the injunctive relief which had been sought "provided that the Commission shall examine the aforesaid records in a place and manner convenient to petitioner" (J.A. 21). The Commission immediately sought to conduct the audit in compliance with the proviso of the Court's order, but petitioner again declined to acquiesce in the audit, which facts are shown by the affidavit of James L. Wallace and attachments thereto, included in this brief as Appendix C.

SUMMARY OF ARGUMENT

The order issued by the Federal Maritime Commission on April 7, 1964, here under review, was validly issued under section 21 of the Shipping Act, 1916, and it is a proper exercise of the Commission's power under that statutory section. The order clearly states the purpose for which it was issued, i.e., to verify a financial report filed by the petitioner.

There is involved in this proceeding no question of a conflict with a rulemaking proceeding or with rules issued by the Commission, because, as shown by the affidavit previously filed in this proceeding and attached to respondents' brief as Appendix B, the rulemaking proceeding and the rules issued pursuant thereto involve reports different from the one which the Commission now seeks to verify.

The order is not unduly burdensome to petitioner because the books and records may be produced at a place other than the Commission's offices in Washington, i.e., they may be examined at petitioner's offices in New York.

ARGUMENT

I. The Commission's Order Is A Valid Exercise Of Its Statutory Power.

Petitioner relies primarily on its contention that the Commission does not have authority under section 21 of the Shipping Act, 1916, to conduct an audit of petitioner's books and records. This argument seems to be premised on the theory that because the right to audit has been given other regulatory agencies specifically with reference to the term "audit," nowhere in the statutes the Commission administers does the word appear. The argument is fallacious, because whether or not the order is termed an audit or a production of documents, the order is squarely within the terms of section 21 of the Shipping Act, 1916, which provides:

Sec. 21. That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts or transactions appertaining to the business of such carrier or other person subject to the Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of \$100 for each day of such default.

Furthermore, an examination of the decisions of the Supreme Court, this Court, the Second Circuit, and the Ninth Circuit in the cases of Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 (1937), Montship Lines, Ltd. v. Federal Maritime Board, 111 App. D.C. 160, 295 F.2d 147 (1961), Hellenic Lines, Ltd. v. Federal Maritime Board, 111 U.S. App. D.C. 151, 295 F.2d 138 (1961), Far East Conference, et al. v. Federal Maritime Commission, (D. C. Cir., August 20, 1964), Kerr Steamship Co., Inc. v. United States,

284 F.2d 61 (1960), and Pacific Westbound Conference v. United States and Federal Maritime Commission, 332 F.2d 49 (1964), supports respondents' position as to the validity of the order in question.

A mere reading of the challenged order (J.A. 12-14) demonstrates the sufficiency of its purpose. The order specifically states that:

In order to evaluate and verify the reports filed pursuant to General Order 5, the Commission's staff must conduct audits of the books and records of the reporting carriers and other persons subject to the Act. Such audits are absolutely necessary to the discharge of the Commission's responsibilities, and if they were not undertaken the reports filed with the Commission would not be subject to verification, and therefore of uncertain value to the Commission. (J.A. 12-13)

Moreover, petitioner's attempt to support its attack on this order with the Montship and Hellenic cases, supra, is utterly misplaced. In Montship this Court upset the order there involved because of an "absence of any indication whatsoever" as to the order's purpose, and in Hellenic the Court declared inadequate orders which merely cited the agency's general Shipping Act responsibilities. The order now being challenged contains an ample statement of purpose. Recently, in the Far East Conference case, supra, this Court said:

A principal argument of petitioners is based on the decisions of this court in the Montship case, and in Hellenic Lines, Ltd. v. Federal Maritime Board, 111 U.S. App. D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to the particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort

by the Commission to meet the defect pointed out in our Montship and Hellenic Lines decisions, and, like the Ninth Circuit in its recent decision in Pacific Westbound, we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. (Slip opinion, pages 9-10)

Petitioner's argument that the purpose of the order is so vague as to invalidate the order would seem to be an afterthought. Petitioner raised this argument for the first time in its reply memorandum in support of its request for an interlocutory injunction and now repeats the argument in its brief on the merits. No such error was alleged as a ground upon which relief was sought, as required by Rule 38(a) of the rules of this Court. The contention, respondents submit, is meritless, for again on its face the order is adequately sufficient to appraise petitioner what is required and for what purpose.

II. There Is Involved In This Proceeding No Question Of Rulemaking Or Whether The Commission Has Authority Under Its Rules To Conduct An Audit, Since The Order Is Squarely Within The Terms Of The Statutory Section Under Which It Was Issued, And Therefore Resort To Rules Is Unnecessary.

Petitioner repeats in its brief the identical contention made in its application for interlocutory injunction that the Commission had outstanding at the time it issued the order here under review a general rulemaking proceeding wherein the Commission was proposing a rule to allow audits. Respondents submitted as an attachment to "Respondents' Memorandum In Opposition to the Application For Interlocutory Injunction" the affidavit of James L. Wallace, Director of the Bureau of Financial Analysis of the Commission, which stated that the rulemaking proceeding was unrelated to the

order here under review, and that the reports which would be required by the rules adopted in that proceeding were substantially different from the report which the Commission is now seeking to verify by means of the instant order. For the convenience of the Court, this affidavit is reproduced as Appendix B to respondents' brief.

Subsequent to this Court's order denying the interlocutory injunction sought by petitioner, petitioner has filed an appeal challenging the final rules issued by the Commission in its Docket 1152, Reports of Rate Base and Income Account of Domestic Offshore Carriers (J.A. 20-38).^{2/} By this appeal, petitioner recognizes that there is no relation between the instant order and the rulemaking proceeding, as the rules involved in the second appeal provide for reports to be filed subsequent to 1964, and the order now under review seeks verification of a report filed for 1962. Nevertheless, the issue of the Commission's right to verify any report filed with it is at the heart of both appeals, and a prompt disposition of this case by the Court in favor of respondents will enable respondents to move with dispatch to dismiss the second appeal.

III. There Is Involved In This Proceeding No Issue Of Undue Burden Or Unreasonable Search And Seizure, As Orders Far More Comprehensive Than The One Under Review Have Been Upheld.

Petitioner again argues that the order constitutes an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution. This argument was put to rest in United States v. Morton Salt Co., 338 U.S. 632 (1950) where the Supreme Court said that:

2/ This appeal was docketed on August 1, 1964, as No. 18,818.

"it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. 632, at 652. Accord, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and Far East Conference v. Federal Maritime Commission, supra. The Commission's order clearly meets this test.

As was also said in Morton Salt:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has the power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analagous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law. 338 U.S. 632, at 642-43.

In its order denying the application for interlocutory injunction, this Court put to rest petitioner's argument of undue burden by conditioning the denial on a proviso that the Commission "shall examine the aforesaid records in a place and manner convenient to petitioner." (J.A. 21). As shown by the affidavit attached to this brief as Appendix C, the Commission is now willing to do just this. In fact, the Commission has at all times demonstrated that it desires to cooperate with petitioner in this regard, in line with this Court's statement in the Far East Conference case that "We rely on the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying." (Slip opinion, p. 10)

Under its "undue burden" argument, petitioner raises the additional argument that petitioner "has no right to divulge" the information which the Commission's accountants will evidently encounter in their examination of the records of petitioner. In making this argument, based supposedly on the confidentiality of the information, petitioner entirely overlooks section 20 of the Shipping Act, 1916 (46 U.S.C. 819), which provides in part that:

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers.

Petitioner's duty of confidentiality, then, is relieved by the statute in this instance, and its argument in this regard is meritless.

CONCLUSION

For the foregoing reasons, Respondents pray that the order of the Commission be affirmed, that the petition to review be dismissed, and that the Court grant enforcement of the Commission's order.

Respectfully submitted,

William H. Orrick, Jr.
Assistant Attorney General

James L. Pimper
General Counsel

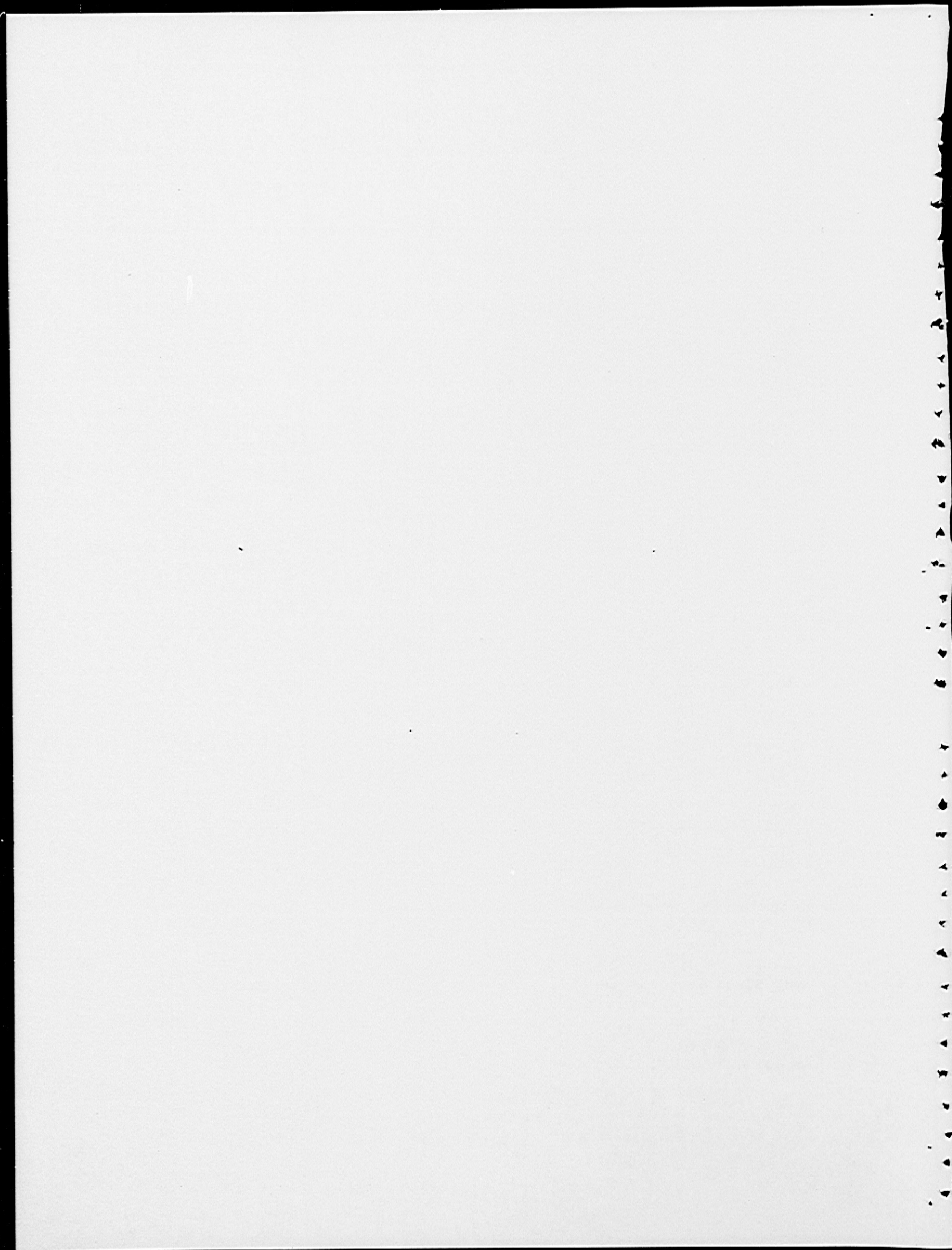
Gerald Kadish
Attorney

Walter H. Mayo III
Attorney

Department of Justice

Federal Maritime Commission

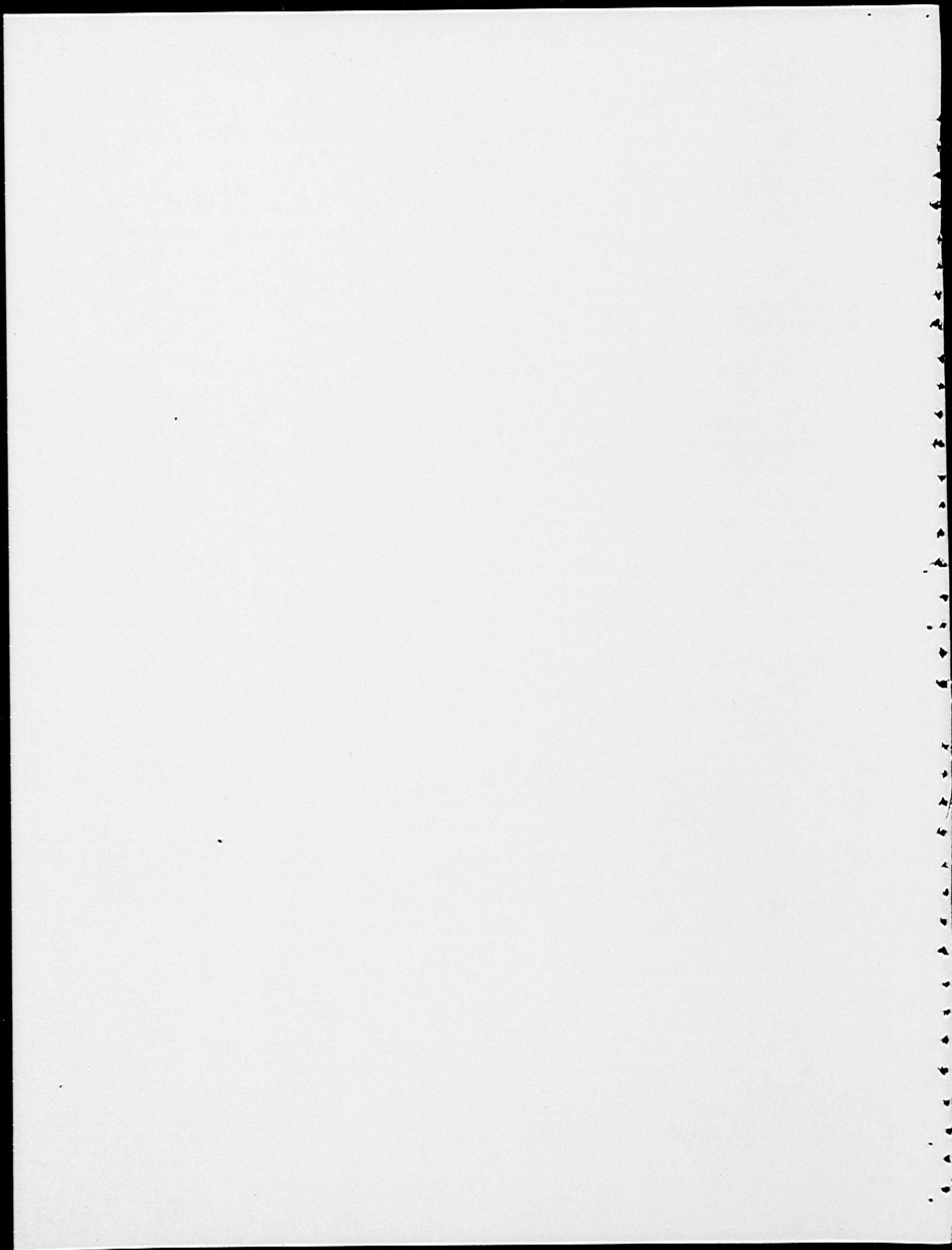
Washington, D. C.
August 21, 1964



SECTION 20, SHIPPING ACT, 1916
46 U.S.C. 8197

"That it shall be unlawful for any common carrier by water or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, or for any other person authorized by such carrier or person to receive information, knowingly to disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier or other person subject to this act for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used.

Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, in the exercise of his powers, or to any officer or other duly authorized person seeking such information for the prosecution of persons charged with or suspected of crime, or to another carrier, or its duly authorized agent, for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers."



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,

Petitioner,

v.

No. 18,667

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

AFFIDAVIT OF JAMES L. WALLACE IN OPPOSITION
TO APPLICATION FOR STAY AND INTERLOCUTORY INJUNCTION

UNITED STATES OF AMERICA)
DISTRICT OF COLUMBIA) ss.
CITY OF WASHINGTON)

JAMES L. WALLACE, being first duly sworn, on oath, deposes and says:
That he is the Director of the Bureau of Financial Analysis of the Federal Maritime Commission, herein called "the Commission," that Alcoa Steamship Company, Inc., petitioner in the above captioned case, filed with the Commission on June 17, 1963, a financial report for the calendar year 1962, which report is known as "FMC-64"; that such report is a company-wide report which includes a balance sheet, income account, surplus account, and supporting schedules; that the Commission issued its Section 21 Order under review in the above-captioned case to obtain records, reports, and data so as to verify the accuracy of said report, which order was issued by the Commission upon the recommendation of the affiant after informal attempts to verify said report had

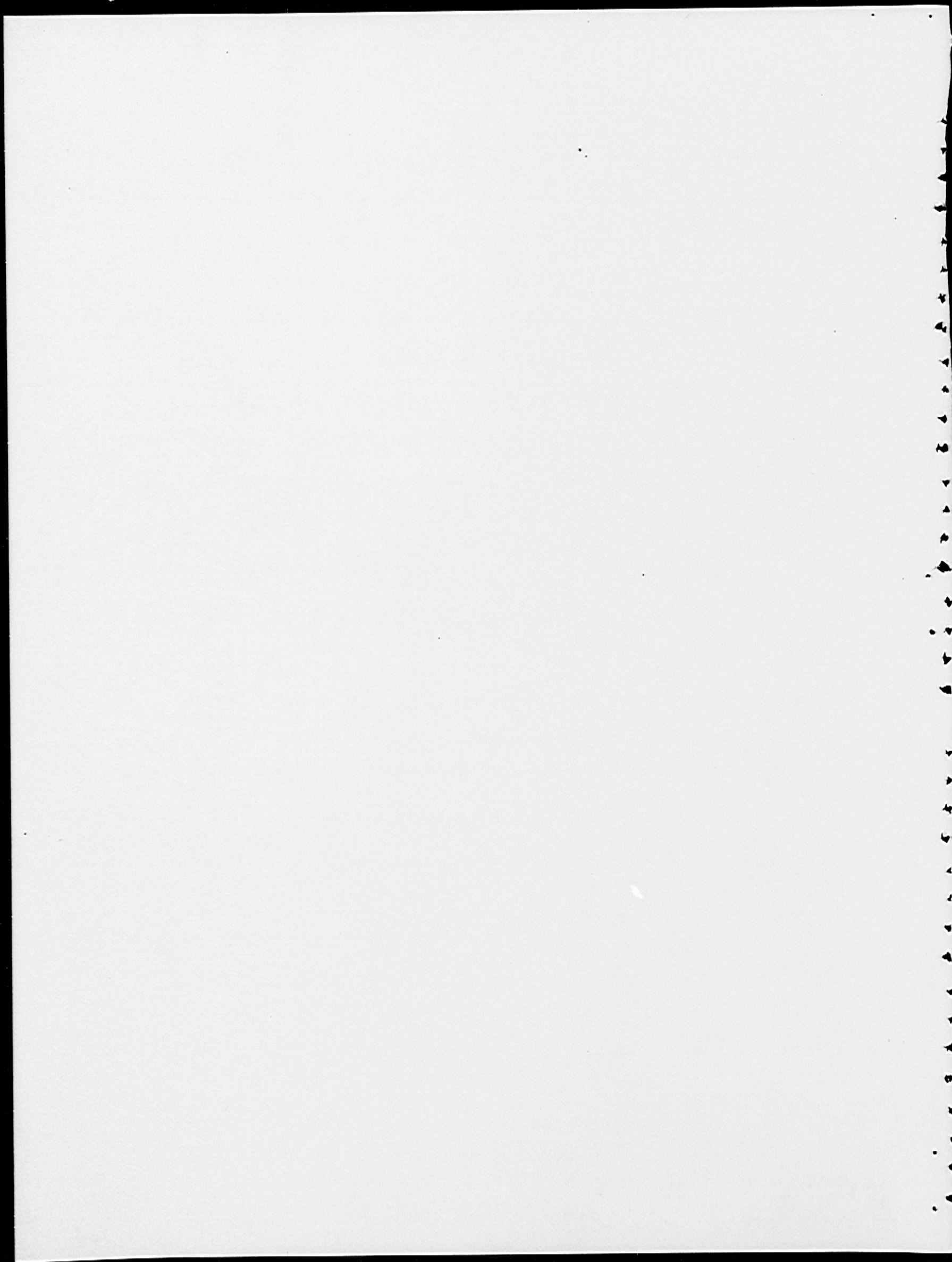


failed; that on October 23, 1963, the Commission published in the FEDERAL REGISTER a notice of proposed rulemaking concerning reports of rate base and income account by vessel operating common carriers in the domestic offshore trades, which reports would contain information as to rate base, income account and supporting schedules for the regulated trade only; that the Commission published final rules in the FEDERAL REGISTER on June 17, 1964, copy of which is attached to this affidavit; that the reports required by these rules are separate and distinct from the report "FMC-64" filed by petitioner; and that the order requiring the records, reports, and data of petitioner has no relation whatsoever to the rules issued by the Commission on June 17, 1964,

James L. Wallace

SUBSCRIBED and SWORN to before me, this 18th day of June, 1964,
in the City of Washington, District of Columbia.

Ruth May Burroughs
Notary Public
My commission expires:



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALCOA STEAMSHIP COMPANY, INC.,)

Petitioner,)

v.)

No. 18,667

FEDERAL MARITIME COMMISSION and)
UNITED STATES OF AMERICA,)

Respondents.)

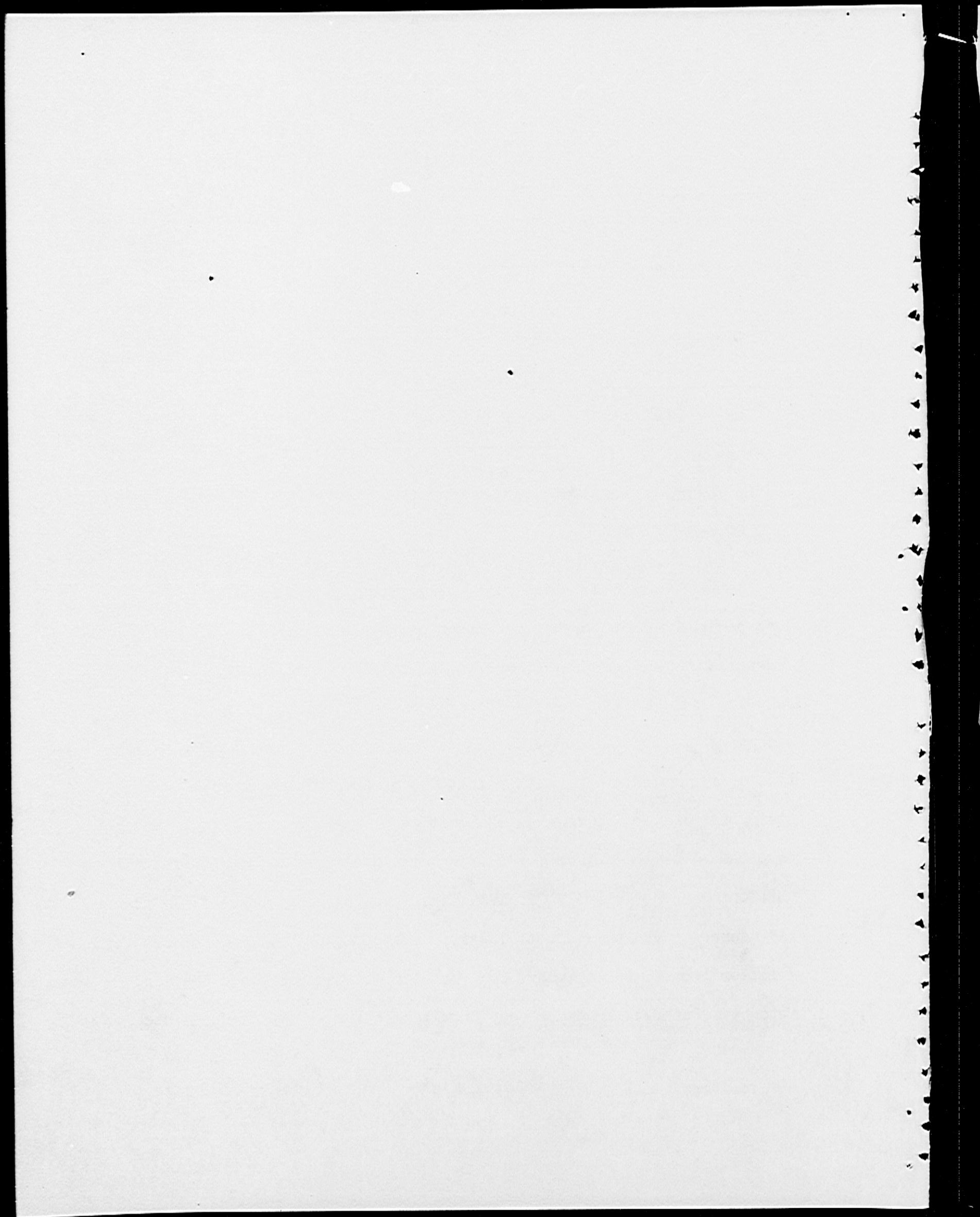
AFFIDAVIT OF JAMES L. WALLACE

UNITED STATES OF AMERICA)
DISTRICT OF COLUMBIA)
CITY OF WASHINGTON)

ss.

JAMES L. WALLACE, being first duly sworn, deposes and says:

That he is the Director of the Bureau of Financial Analysis of the Federal Maritime Commission, herein called "the Commission"; that on July 23, 1964, he addressed a letter to Alcoa Steamship Company, Inc., a copy of which letter is attached to this affidavit as "Attachment A"; that he requested in the letter that two members of the Commission's staff be permitted to make an examination of the documents required to be produced by the Commission's order here under review, in accord with the Court's order of July 22, 1964, that such examination be "in a place and manner convenient to petitioner"; that on August 6, 1964, he received a letter from Elmer C. Maddy, Esq., of Kirlin, Campbell, and Keating, Attorneys for Petitioner, a copy of which letter is attached to this

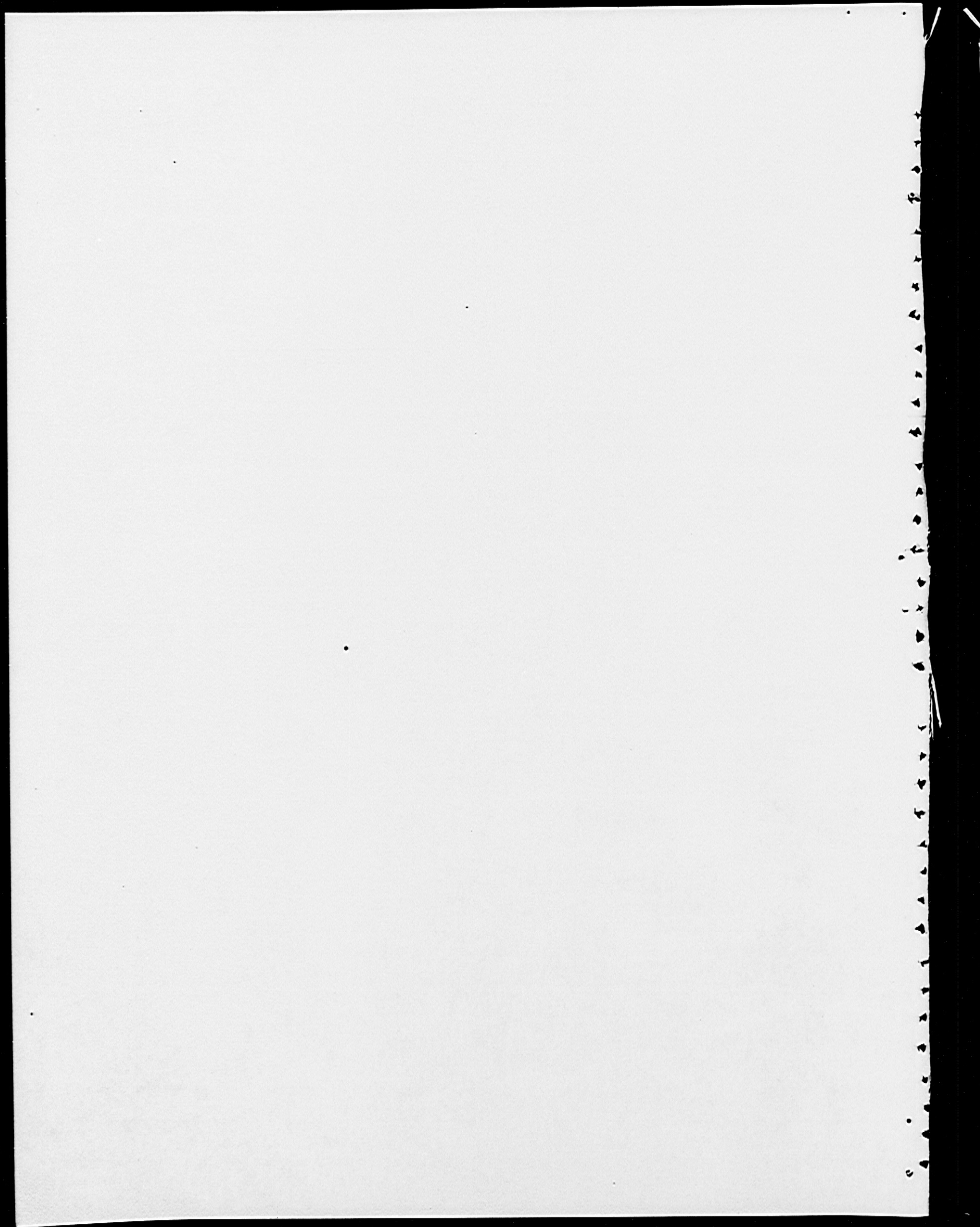


affidavit as "Attachment B", in which letter it was stated that "the right of the Commission to audit the books and records . . . has still to be determined . . . " and that Petitioner's attorneys could not therefore give their consent to an examination of the books and records.

James L. Wallace

SUBSCRIBED and SWORN to before me, this 21st day of August, 1964,
in the City of Washington, District of Columbia.

Ruth May Burroughs
Notary Public
My Commission expires May 31, 1967.



FEDERAL MARITIME COMMISSION
WASHINGTON 25, D.C.

IN REPLY REFER TO:
030

July 23, 1964

Alcoa Steamship Company, Inc.
Seventeen Battery Place
New York, New York 10004

Attention: Mr. O. A. Swenson

Re: Alcoa Steamship Company, Inc. v. Federal
Maritime Commission, No. 18,667 - D. C.
Circuit

Dear Sir:

Reference is made to the Court's order dated July 22, 1964, denying your application for stay and interlocutory injunction, and stating that the Commission "shall examine the records in a place and manner convenient to petitioner."

Pursuant to the terms of the order, Messrs. Finegan and Chuback of the Commission's staff will be prepared to commence an audit of the documents and records covered by the Commission's order on Wednesday, July 29, 1964, at 9 A.M. at your offices at 17 Battery Place, New York.

Please promptly advise if the foregoing is agreeable to you.

Sincerely yours,

(Sgd.) James L. Wallace

James L. Wallace
Director, Bureau of Financial Analysis

cc: Clerk, United States Court
of Appeals, District of
Columbia Circuit
Paul F. Mc Guire, Esq.
Russell T. Weil, Esq.
Kirlin, Campbell & Keating
Clement C. Rinehart, Esq.
Elmer Maddy, Esq.

"APPENDIX C"

Attachment B

71
72
WASHINGTON OFFICE
THE FARRAGUT BUILDING
900 SEVENTEENTH ST., N.W.
WASHINGTON 6, D.C.

RONALD A. CAPONE
RESIDENT PARTNER

KIRLIN, CAMPBELL & KEATING

ONE TWENTY BROADWAY

NEW YORK 5, N.Y.

OUR REF. NO. 68942

August 5, 1964

Mr. James L. Wallace
Director, Bureau of Financial Analysis
Federal Maritime Commission
Washington 25, D.C.

Re: Alcoa Steamship Company, Inc. v.
Federal Maritime Commission,
No. 18,667 - D.C. Circuit

Dear Mr. Wallace:

Your letter of July 23, 1964 advising that you were prepared to commence an audit of the documents and records covered by the Commission's Section 21 Order at Alcoa Steamship Company, Inc.'s offices has been turned over to us for a reply.

We wish to advise you that in view of the fact that the right of the Commission to audit the books and records of Alcoa Steamship Company, Inc. has still to be determined in the above-entitled proceeding, we cannot under the circumstances consent to the audit of such books and records since in our opinion the Commission is proceeding

CLETUS KEATING
L. DE GROVE POTTER
VERNON S. JONES
H. MAURICE FRIDLUND
JAMES H. HERBERT
CLEMENT C. RINEHART
ARNOLD TULP
WILLIAM A. SHEEHAN
LOUIS J. GUSHANO
JOHN F. GERITY
EARL Q. KULLMAN
JAMES B. MAGNOR
J. M. CUNNINGHAM
WALTER P. HICKEY
ELMER C. MADDY
JAMES J. HIGGINS
MATTHEW L. DANAHAR
THOMAS COYNE
EDWARD J. HEINE, JR.
MARSHALL P. KEATING
RICHARD H. BROWN, JR.
RICHARD H. SOMMER
PAUL F. MCGUIRE
ALEXANDER E. RUGANI
ROBERT P. HART
DANIEL J. DOUGHERTY



to act improperly in seeking to do so.

For your information we have today written to Mr. Mayo of the Commission's Office of General Counsel suggesting an expedited scheduling of briefing in this case in an endeavor to obtain a speedy determination of the issues presented by Alcoa's Petition for Review of the Commission's Section 21 Order.

Very truly yours,

KIRLIN, CAMPBELL & KEATING

BY: *Elmer C. Maddy*

ECM:mlw

cc: Clerk

U.S. Court of Appeals
for the District of Columbia
Constitution Ave. & John
Marshall Place, N.W.
Washington, D.C.

*Copy sent to
Mr. Mayo
7-6-64 per
glw/msh.*

